(22,037.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 215.

THE CITY OF POMONA ET AL., APPELLANTS,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a

No. 1678.

United States Circuit Court of Appeals for the Ninth Circuit.

(In Two Volumes.)

TRANSCRIPT OF RECORD.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation, Appellant,

vs.

THE CITY OF POMONA (a Municipal Corporation), in the County of Los Angeles, State of California; The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Appellees.

Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

1 *Names and Addresses of Attorneys.*

For Appellant:

Pillsbury, Madison & Sutro, E. S. Pillsbury, H. D. Pillsbury, Alfred Sutro, Kohl Building, San Francisco, California.
Lawler, Allen, Van Dyke & Jutten, Conservative Life Building, Los Angeles, California.

For Appellees:

Robert G. Loucks, Los Angeles, California.

[*Citation.*]

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Pomona, a Municipal Corporation in the County of Los Angeles, State of California; The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit,
2 to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant

to an order allowing an appeal, of record in the Clerk's office of the Circuit Court of the United States, for the Southern District of California, Southern Division, wherein Sunset Telephone and Telegraph Company, a corporation, is appellant, and you are appellees, to show cause if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Olin Wellborn, United States District Judge for the Southern District of California, this 19th day of December, A. D. 1908.

OLIN WELLBORN,
United States District Judge.

I hereby certify that I received the within citation on the 22 day of Dec., and served the same on R. G. Loucks on the 24th day of Dec., 1908.

LEO V. YOUNGWORTH,
U. S. Marshal.
B. H. FRANKLIN, *Deputy.*

[Endorsed:] Marshal's Doc. No. 1297. No. 1209—In Equity. U. S. Circuit Court of Appeals, for the Ninth Circuit. Sunset Telephone and Telegraph Company (a Corporation), Appellant, vs. City of Pomona et al., Appellees. Citation. Filed Dec. 24,
3 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California; The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slemker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slemker; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents.

Bill in Equity.

To the Judges of the Circuit Court of the United States in the Ninth Circuit, Southern District of California, Southern Division, Sitting in Equity:

4 The Sunset Telephone and Telegraph Company, a Corporation organized and existing under and by virtue of the

laws of the State of California, as hereinafter set forth, having its principal place of business in the town of Martinez, in the County of Contra Costa, in said State, complainant herein, brings this its bill against the City of Pomona, a body politic and corporate, organized and existing under and by virtue of the laws of the State of California; the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as the members of and constituting the said Board of Trustees of the said City of Pomona; S. C. Slemker, as the Superintendent of Streets of the said City of Pomona; S. C. Slemker, individually; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, individually; John Doe, Richard Roe and Charles Foe, whose true names are unknown, and who are therefore sued by fictitious names; and your orator will pray to have the true names of each of said respondents inserted in this bill when the same are ascertained:

And thereupon humbly complaining, your orator, Sunset Telephone and Telegraph Company, shows unto your Honor as follows:

I.

That your orator is, and at all the times hereinafter mentioned was, and for more than ten years last past has been, a corporation organized and existing under and by virtue of the laws of the State of California as a telephone and telegraph company, and was
5 at all said times, and is, authorized and empowered by its articles of incorporation to do a general telephone and telegraph business, and that as such corporation it has constructed and established, and now maintains and operates, extensive telephone and telegraph lines and systems and apparatus and appliances, for the purpose of transmitting intelligence by electricity through means of telegraph and telephone instruments in the State of California, Oregon, Washington, Idaho, and Nevada, and that the principal place of business of the said corporation is in the Town of Martinez, County of Contra Costa, State of California.

That your orator, the said Sunset Telephone and Telegraph Company, is, and at all the times herein mentioned has been, a citizen and resident of the State of California; that now and for many years last past in the transaction of its said business and as a part thereof and by use of its said systems, your orator transmits and delivers by means of its said lines and telegraphic and telephonic instruments and apparatus connected therewith, messages and communications originating at points and places outside of said State of California and transmitted by and over its said lines to points and places within said City of Pomona, and to other points and places within said State; and also in like manner and by like means transmits like messages and communications originating at points and places within said City of Pomona and at other points and places within said State of California to points and places outside of said State; and also by said lines and like means, instruments and appliances,
6 transmits and delivers messages and communications originating within the said City of Pomona and at other points within the State of California, to other places within said State.

That ever since the 6th day of January, 1888, the said City of Pomona has been and still is a body politic and corporate of the fifth class, organized and existing under and by virtue of the laws of the State of California, and forming a municipal corporation of and in said State of California in the County of Los Angeles thereof, by the name and style of the City of Pomona; that the respondents Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery are now, and ever since the — day of January, 1905, have been, the duly elected, qualified and acting Board of Trustees of the said City of Pomona, and have constituted, and do now constitute, the said Board of Trustees; that the respondent S. C. Slemker now is, and ever since the — day of January, 1905, has been, the duly appointed, qualified and acting Superintendent of Streets of the said City of Pomona; that the respondent R. G. Loucks now is, and ever since the — day of January, 1905, has been, the duly appointed, qualified and acting City Attorney of the said City of Pomona, and all of said respondents will hold office during the year A. D. one thousand nine hundred and five; that the said respondents, together with the said John Doe, Richard Roe and Charles Foe, whose true names are unknown, are, and each of them is, a citizen and
7 resident of the said State of California, and said respondents are, and each of them is, an inhabitant and resident of the said Southern District of California.

II.

That on the 4th day of December, 1897, your orator accepted in writing, without reservation, all of the restrictions and obligations of the Act of Congress, approved July 24, 1866, entitled, "An Act to aid in the construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes." That thereafter, and on the 14th day of December, 1897, your orator filed said written consent with the Postmaster-General, as and in the manner by said Act provided, and that thereupon and on said 14th day of December, 1897, the said Postmaster-General certified in writing that said acceptance was on said 14th day of December filed in the office of said Postmaster-General.

That at the time of said acceptance and filing your orator was using, and ever since has used, its lines, hereinafter more particularly mentioned and described, for telegraphic purposes, and for sending and transmitting messages thereon and thereover, by and through the use of telegraphic instruments, each of which consist- of an ordinary key, relay and sounder, and by means of the Morse signals.

III.

That your orator has the right to construct and maintain and operate, and in conducting its said business did, for more than ten years prior to the 1st day of September, 1905, by and
8 with the acquiescence and consent of the said City of Pomona and of the said Board of Trustees thereof, erect, place, construct, maintain and operate, and ever since has maintained and

operated, and does now maintain and operate, under and by virtue of the laws of the State of California, and under and by virtue of the provisions of the said Act of Congress approved July 24th, 1866, certain lines, consisting of poles, arms, insulators, wires and other apparatus, fixtures and appliances, in, over and along certain of the public roads, streets and highways of the said City of Pomona.

That the said roads, streets, alleys and highways in, over and along which said lines have been so constructed, in the said City of Pomona, were and now are kept up and maintained as public roads and highways, and were and are public roads and highways, of the State of California, and were and now are also open post-roads of the United States; that all the said lines of your orator and the poles, arms, insulators and wires, and other apparatus, fixtures and appliances used in connection therewith have been and now are so constructed, operated and maintained that they do not, nor does any of them, in any manner interfere with the ordinary travel along or upon or in the said roads, streets, alleys or highways, or any of them.

That the said lines have always been, and now are, no more than sufficient for the proper and efficient conduct of the business of your orator in the City of Pomona, and that your orator always has maintained and operated, and does now maintain and
9 operate its said lines under and pursuant to law, as it had and has the right to do.

That ever since the said 14th day of December, 1897, your orator, pursuant to the terms of the said act of Congress of July 24th, 1866, has accepted, and does now accept, and will continue to accept, all telegrams between the several departments of the Government of the United States and their officers and agents tendered to it for transmission over all or any of its herein-mentioned lines, at rates annually fixed and to be fixed by the Postmaster-General of the United States, and that your orator, ever since said 14th day of December, 1897, has always given, and does now give and will continue to give, all or any such message or messages priority over all other business. And in this behalf your orator further avers that it has on file in its office for the information of its various officers and agents in the transaction of telegraph business for the Government of the United States a schedule of rates entitled "Schedule of Rates for Government Telegrams," issued by the Postmaster-General of the United States on August 5th, 1904. That annexed to said schedule and issued by said Postmaster-General is a list entitled, "Telegraph Companies which have accepted the conditions of the Act of July 24th, 1866, and which are subject to the provisions of the Order of the Postmaster-General fixing Government Rates"; that the name of your orator appears in said list as follows: "125. Sunset Telephone and Telegraph Company. John
10 I. Sabin, President, San Francisco, Cal. Received and Filed December 14, 1897." And your orator further avers that it always has been, and now is, ready and willing, on application by any officer of the State of California, or of the United States, in case of any war, insurrection, riot, or other civil commo-

tion, or resistance of public authority, for the prevention or punishment of crime, or for the arrest of persons suspected or charged therewith, to give to the communications of such officers immediate dispatch at the price of ordinary communications of the same length.

IV.

That on the 6th day of June, 1905, the said Board of Trustees of the City of Pomona passed a certain resolution, a copy of which is hereunto annexed, marked Exhibit "I," and asked to be taken as a part of this bill with the same force and effect as though herein at length recited; that pursuant to the said resolution, and on the — day of July, 1905, your orator appeared before said Board of Trustees, through its counsel, and then and there represented to said Board that your orator was transacting a telegraph business in the said City of Pomona and had accepted the provisions of the said Act of Congress approved July 24th, 1866, and also represented that your orator was doing an interstate telephone business by, through and over its said lines in said City of Pomona, and was engaged in interstate commerce, and as evidence thereof then and there exhibited to said Board of Trustees a decision of the Honorable James H. Beatty, United States District Judge,
11 rendered in this Honorable Court of the Ninth Circuit, in and for the Northern District of California, in a certain action entitled "Sunset Telephone and Telegraph Company vs. City of Eureka et al.," a copy of which opinion and decision is hereto attached, marked Exhibit "2," and asked to be taken as a part of this bill with the same force and effect as if the same were herein at length recited; and your orator did also then and there exhibit to said Board of Trustees a certain bill of complaint filed by your orator in this Honorable Court on the 23d day of March, A. D., 1903, entitled "Sunset Telephone and Telegraph Company vs. The City of Redlands et al.," and to which bill of complaint reference is hereby made and did also exhibit to said Board of Trustees a certain restraining order and injunction issued upon said bill of complaint on said 23d day of March, 1903, by Honorable Erskine M. Ross, United States Circuit Judge, and to which restraining order reference is also hereby made, and did then and there respectfully request said Board of Trustees not to interfere with the maintenance or operation of its said lines in the City of Pomona; but notwithstanding said representations by your orator, said Board of Trustees did, on the 1st day of August, 1905, pass a resolution, a copy of which is hereto annexed and marked Exhibit "3," and asked to be taken as a part of this bill and with like force and effect, as though the same were at length herein recited; that thereafter and on the 11th day of August, 1905, a notice was served upon your orator by respondent S. C. Slemker, as Street
12 Superintendent of the City of Pomona, a copy of which is hereto annexed marked Exhibit "4," and asked to be taken as a part of this bill with like force and effect, as though the same were at length herein recited; that thereafter, and on the 30th day

of August, 1905, your orator, by and through its President, caused a notice to be served upon said respondent S. C. Slemker, as Street Superintendent of the City of Pomona, a copy of which is hereto attached, marked Exhibit "5," and asked to be taken as a part of this bill with like force, and effect, as though the same were herein at length recited.

V.

That in order to conduct the telegraph and telephone business of your orator and meet the demands of residents of said City of Pomona for such services as hereinbefore stated, it has been necessary for your orator to erect, construct and maintain, and your orator has erected, constructed and maintained, certain telegraph and telephone lines in certain public streets, alleys and avenues of said City, each and all of which are public highways of the State of California and are also open post-roads of the United States, together with the necessary poles, arms, insulators and wires and other apparatus and fixtures and appliances used in connection with said lines in the conduct of a telegraph and telephone business, and which lines so as aforesaid erected by your orator have been constructed, operated and maintained in full compliance with all reasonable regulations as to the height of wires and location
13 of poles as may have been prescribed by the Board of Trustees, and in such form that they do not in any way interfere with the ordinary travel along or upon or in said streets, alleys and avenues, or either of them, or obstruct the same.

VI.

That your orator does now operate and maintain and for more than ten years last past has, by and with the consent and acquiescence of the said City of Pomona, operated and maintained about four hundred telephones in the said City; there is one telephone exchange and public office of your orator operated and maintained in said City; each one of said telephones is connected with the entire system of your orator as hereinbefore set forth, and messages are and can be transmitted from each and any one of said telephones over the wires and lines of your orator to any other telephone in the said City of Pomona, or in the State of California, and to many points and places in the States of Oregon, Washington, Idaho and Nevada, upon the said lines and instrumentalities so as aforesaid owned and operated by your orator.

That the action of the said Board of Trustees and the said Superintendent of Streets, as hereinbefore set forth is an attempt to regulate commerce between the several States, and is in violation of the provisions of subdivision 3 of Section 8 of Article I of the Constitution of the United States, and the said action is unlawful and void. That the said telephone business of your orator so as aforesaid conducted and carried on in the said City of
14 Pomona is an interstate business, and the said action of the said Board of Trustees is an unlawful and unwarranted

interference with and an attempted regulation of said interstate business.

That the said action of said Board of Trustees is in violation of the provisions of subdivision 1 of Section 10 of Article I of the Constitution of the United States; and in this behalf your orator particularly avers that within the ten years next preceding the 6th day of June, 1905, your orator, as it had the right to do, and with the acquiescence and consent of the said City of Pomona, erected, placed, constructed, maintained and operated, and it ever since has maintained and operated, its poles and lines of wire, with the necessary arms, apparatus a[illegible] fixtures and appliances used in connection therewith, over and along the streets, alleys, avenues and highways of said city, and your orator has incurred great cost and expense in the erection, construction, maintenance and operation of its said telephone and telegraph system in said city, to wit: more than ten thousand dollars; that by reason of the said acquiescence and consent of the said City of Pomona to the erection, construction, maintenance and operation of the said poles, arms, wires, apparatus and appliances, and the said telephone and telegraph system of your orator in the said city, and in, over and along the said streets, alleys, avenues and highways thereof, a contract permitting the erection, maintenance and operation of the said system of your orator in the said City of Pomona, was entered into between your orator and the said city. That the said
15 unlawful and unwarranted action of the said Board of Trustees impairs the obligation of the said contract entered into between said city and your orator for the erection, maintenance and operation of the said system of your orator in the said city, and in, over and along the said streets, alleys, avenues and highways thereof; and in this regard your orator particularly avers and shows, that on or about the — day of ——, A. D. 1903, your orator had constructed, operated, and was maintaining and operating its said telephone and telegraph system as hereinbefore described, in the said City of Pomona, and without any special franchise or privilege from said city for so doing; that on or about said day a contention arose between your orator and the said City of Pomona as to whether your orator could be required to apply for and procure a franchise for doing its business in said city, and thereupon your orator, by its counsel, appeared before the then Board of Trustees of said city, and denied any obligation on the part of your orator to apply for or procure such franchise, and stated its reasons for such position, and substantially as hereinbefore related in reference to the proceedings had upon the resolution of June 6th, 1905, hereto attached and marked Exhibit "1"; that at said time it asserted by the then Board of Trustees of said city that some of the lines of your orator therein, particularly those along Second Street of said city, were a blemish upon the appearance of said street and a detriment to the property fronting thereon; that thereupon and
16 then and there your orator proposed to said Board of Trustees that if the city would disclaim any right on its part to compel your orator to apply for and procure a fran-

chise for doing its business in said city, your orator would remove its said lines from said Second Street and other localities where they were considered objectionable, and would rebuild said lines upon other streets such as might be designated to your orator by said Board; that said proposition was then accepted by said Board and thereupon, under its direction, your orator removed its lines from said Second Street and other objectionable localities and rebuilt the same upon streets and alleys designated for that purpose by said City of Pomona, through its officials, and in so doing expended a sum of more than six thousand dollars; that all said work was completed prior to May 5, 1904, and accepted as satisfactory by said city, and ever since that time until said June 6, 1905, your orator has maintained and operated its said telegraph and telephone system in said City of Pomona without objection or hindrance on the part of its Board of Trustees and without any interference whatever. And your orator alleges and shows that more than two years prior to June 1, 1905, the said City of Pomona contracted and agreed with your orator that if it would remove certain of its lines in said city and reconstruct the same at such places as were designated, the said city would recognize and admit the right of your orator to maintain and operate its telephone and telegraph system in said city as it had theretofore been doing and without any interference, let or hindrance, and without being requested or compelled to apply for any franchise of any description whatever from
17 said city for the conduct of its said business; and your orator avers that it has kept and performed all the conditions of said agreement on its part, and that it had kept and fully performed the same prior to May 5th, 1904.

VII.

That during all the times herein mentioned and long prior to said June 6, 1905, your orator maintained and does now maintain a telegraph office in said City of Pomona in conjunction with its telephone exchange so as aforesaid also kept and maintained in said city, and your orator was at all said times and still is accustomed to receive telegraph messages from the residents of said City of Pomona and transmit the same to persons in other places in the State of California, and also in the States of Oregon, Washington, Idaho, and Nevada; also to receive like messages from perrsons in all of said places to residents of said City of Pomona and transmit and deliver the same to such residents in said city, in one continuous service and over its own lines as hereinbefore mentioned and described; that in so sending and receiving such messages the lines of your orator in the City of Pomona now constructed and to be hereafter constructed, are and will be necessary and used in sending and receiving the said telegraph messages, and are and will be instrumentalities of interstate commerce; and your orator avers that in the erection, construction and maintenance of all of said lines your orator cannot be compelled or required to obtain the permission of the said Board of Trustees of the said City of
18 Pomona so to do, and your orator is only required in that regard to comply with the reasonable regulations of the said

City of Pomona as to the height of its wires, position of its poles and the like, and so as not in any manner to interfere with the ordinary travel along or upon or in the streets, alleys or avenues of said city, or obstruct the same, all of which your orator has heretofore done and will continue to do and hereby expressly declares its intention and purpose so to do.

VIII.

That your orator has about four hundred telephone subscribers in said City of Pomona, each of whom rents a telephone instrument from your orator which is connected with a telephone exchange in said city; that each of said subscribers has the right and privilege to telephone any telegraph messages to be sent from the City of Pomona by your orator to any other office of your orator in the said States of California, Oregon, Washington, Idaho or Nevada, to the main office of your orator in said City of Pomona, which is there taken down and transmitted over the telegraph lines of your orator; and telegraph messages from points in any of said States to such or any subscribers of your orator are repeated and delivered to them by and through their telephones, and the same constitute a connected and continuous service, and each and all of said telephones of your orator in said City of Pomona have at all of said times been and now are and will continue to be instruments for the transaction of interstate commerce, and for the transmission of telegraphic messages and telephonic communications
19 from residents and subscribers in said City of Pomona to persons in the States of Oregon, Washington, Idaho and Nevada, by, through and over the said lines and instrumentalities, all of which are owned and operated by your orator at points and places within said States; and your orator further avers and shows that in the usual course of the transaction of its business as aforesaid it is accustomed, in the usual course of its business as aforesaid, to receive telegraphic messages sent from points outside the State of California and within the United States to its subscribers in various places in the State of California, including the said City of Pomona, at its central exchange in said places, including said City of Pomona, and to transmit the contents thereof to its subscribers by telephone in advance of delivering written copies thereof, and in many instances no written copies of such telegrams are delivered, the subscribers accepting such messages as telephoned; that subscribers of your orator in said City of Pomona have received telegraphic messages in that manner and will continue to so receive them over all the lines of your orator in said city, and including the lines hereinafter mentioned which have been interfered with and destroyed by the officials of said city.

IX.

Your orator further shows that it now is and always has been ready and willing to abide by, observe and perform any and all reasonable and proper and valid regulations and restrictions which

the said Board of Trustees of the City of Pomona, or their successors, may at any time impose or cause to be imposed upon
20 your orator in the construction, maintenance and operation of its said poles and lines upon which its said telegraph and telephone business is so as aforesaid conducted and carried on, and which may hereafter be conducted and carried on in the said City of Pomona.

X.

And your orator further shows that on the 1st day of September, 1905, the respondents S. C. Slemker and R. G. Loucks, claiming and pretending to act by and under the said resolution of August 1st, 1905, hereto attached and marked Exhibit "3", did commence the destruction of the said telephone lines of your orator in the said City of Pomona and have already cut down and destroyed more than one mile of its said poles and lines in said city, with the wires thereon, and have cut said wires so as to disconnect them from the said system of your orator in said city, and have thereby disconnected and cut off more than twenty telephone subscribers of your orator in the said City of Pomona and prevented and deprived each of them from all use of such telephones and of the said telephone and telegraph system, so as aforesaid furnished to them by your orator. That one of said subscribers had a sick child in her home and protested against being deprived of the use of her telephone, which was then specially needed for the purpose of communicating with her physician, and was then and there told to sue your orator for any damages she might sustain by having her said telephone cut off from the central system; and said respondent Loucks personally participated and assisted in cutting the said wires and destroying the said property of your
21 orator, and then and there advised and encouraged others to assist in such destruction. That the said lines and poles so as aforesaid destroyed on the 1st day of September were an integral portion of the said telephone and telegraph system of your orator in said City of Pomona, and were all instruments used and to be used for the transaction of interstate commerce. And your orator avers and shows that said respondents will continue to cut down and destroy its said lines in the City of Pomona unless restrained by this Honorable Court, and will prevent your orator from maintaining or operating its said telegraph and telephone lines or any of them, and its system, in the said City of Pomona, and from constructing any such lines. That in consequence thereof great and irreparable damage and injury will ensue to your orator and to its business and the same is not susceptible of estimation in money; that by such interference with the proper carrying on of the said business of your orator the Government of the United States, and the several departments thereof, their officers and agents, and the general public, will be put to great inconvenience and loss through being deprived of the use of a complete telephone and telegraph system in said city for the purpose of transmitting and sending over and by means of the same business and personal

messages and communications, and of the same nature as hereinbefore described. That by the said action of respondents great detriment, loss and inconvenience has resulted and accrued, and unless respondents are restrained by the order of this Honor-
22 able Court, will continue to result and accrue, to the business of your orator, through its inability to properly handle messages within and going to and coming from said city, as hereinbefore set forth, the amount of which loss and detriment is not susceptible to pecuniary estimation and determination.

That for many years prior to the 1st day of September, 1905, your orator had received, and was accustomed to receive, telegraph messages and telephone communications from persons outside the State of California, which were sent and directed to, and delivered to, telephone subscribers of your orator in said City of Pomona, and over its lines before mentioned, in said city, and in the manner hereinbefore described; and during said time your orator has also transmitted telephone communications and telegraph messages which were received from its subscribers in said City of Pomona, and delivered the same to parties outside of the State of California and within the United States. That all of said messages and communications so as aforesaid received, delivered and transmitted, were wholly transmitted and delivered over the telephone and telegraph lines of your orator within the City of Pomona hereinbefore mentioned, and which were at all said times connected with the lines of your orator in the States of California, Nevada, Oregon, Washington and Idaho, and all such messages and communications were entirely transmitted and delivered through, upon and over the said lines of your orator. That said interference with and destruction of the property of your orator by said respond-
23 ents Slemker and Loucks, as aforesaid, is in violation of and repugnant to the rights and privileges of your orator under and pursuant to the Constitution and laws of the United States, and particularly under Subdivision 1 of Section 10 of Article I of the Constitution of the United States, and also under said Act of Congress approved July 24, 1866, and by reason of said interference and destruction by said respondents your orator has been deprived of its rights and privileges to construct, maintain and operate lines of telegraph and telephone along and over the public streets, avenues, alleys and highways of the said City of Pomona, to its great and irreparable damage and loss. That the said Slemker and Loucks are financially irresponsible and unable to respond in damages for the injury which they have inflicted and threaten to inflict upon the said property of your orator by and through their said acts and directions, and unless restrained they will proceed to remove or cause to be removed, under their direction, all of the poles, wires and other apparatus and appliances of your orator used in connection with its said lines in the said City of Pomona.

XI.

That this is a suit in equity of a civil nature and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of

five thousand dollars, and that this cause is a suit arising under the Constitution of the United States, to wit: under Subdivision 1 of Section 10 of Article I of said Constitution, and under Section 1 of Article XIV. of the Amendments to said Constitution and that this cause is also a suit arising under the laws of the United States,
24 to wit: under the said Act of Congress approved July 24th, 1866, and the several amendments thereof.

That your orator has no plain, speedy and adequate remedy at law in the premises.

In consideration whereof, and inasmuch as your orator is remediless in the premises under the rules of common law and can have relief only in a Court of Equity, where matters of this sort are properly cognizable and relievable, your orator prays that an injunction may issue out of this Court, restraining and enjoining the said respondents, and each of them, their successors, servants and agents, and the successors, servants and agents of each and all of them, from in any manner interfering with, impeding or hindering, and from causing to be interfered with, impeded, or hindered, your orator in the construction, maintenance, erection, placing or operating of any lines of telegraph and telephone, or telegraph or telephone, and the poles, arms, insulators, wires, and other apparatus and appliances used in connection therewith, or interfering in any manner therewith; and further restraining and enjoining the said respondents, and each of them, their successors, servants and agents, and the successors, servants and agents of each of them, from instituting any suit or suits, action or actions, proceeding or proceedings, of any nature, against your orator for the purpose of hindering, impeding, preventing or interfering in any manner with your orator in the construction, placing, erection, operation or maintenance of
25 the poles, wires, lines, or the appliances or apparatus used in connection therewith, over, in and along the public streets, alleys, avenues and highways of the said City of Pomona, which your orator has constructed and may cause to be constructed, erected, placed, maintained and operated therein for and in the said business of telegraphing and telephoning; and further restraining and enjoining said respondents, and each and all of them, and their successors, servants and agents, and each and all of them, from in any manner preventing or interfering with the exercise in the said City of Pomona of the rights of your orator under the Constitution of the United States, or the said Act of Congress of July 24th, 1866, or under the laws of the State of California;

And your orator prays that in the meantime and until the hearing hereof your orator have an injunction pendente lite, embracing all of the relief herein prayed for, such injunction to continue in force until the determination of the hearing for a writ of injunction, and that on the final hearing of this cause it may have the injunction herein prayed for made perpetual; that your orator may have judgment against the respondents for all damages sustained and to be sustained by reason of the matters hereinbefore pleaded, as well as judgment for special damages against said respondents Slemker and Loucks; and such other and further relief as to this Court and your

Honors may seem right in the premises, together with complainant's costs of suit.

May it please your Honors to grant unto your orator a writ or writs of subpoena to be issued out of and under the seal of
26 this Honorable Court, directed to said respondents, and each of them, as hereinbefore mentioned and designated, commanding the said respondents, and each of them, to appear in this Honorable Court at some day certain to be herein named, and to answer in the premises, but not under oath, answer under oath being expressly waived, and to abide by and perform such decree as may be rendered herein.

SUNSET TELEPHONE AND TELEGRAPH COMPANY,
[SEAL.] By JNO. I. SABIN, *President.*

PILLSBURY, MADISON & SUTRO,
Solicitors for Complainant.

BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER, *Of Counsel.*

NORTHERN DISTRICT OF CALIFORNIA,
State of California, City and County of San Francisco, ss:

John I. Sabin, being first duly sworn, deposes and says: That he is an officer, to wit: the president of the Sunset Telephone and Telegraph Company, a corporation, and the complainant in the foregoing Bill of Complaint; that he has read said Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated to be on information or belief, and as to those matters that he believes it to be true; and further, that the Seal affixed to said Bill is the
27 corporate seal of complainant, and was by him affixed thereto, and the name of said complainant was signed by him to said Bill, by authority of said complaint.

JNO. I. SABIN.

Subscribed and sworn to before me this 2d day of September, 1905.
[SEAL.] R. S. BROWNE,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "1" [TO BILL OF COMPLAINT—RESOLUTION OF BOARD OF TRUSTEES OF CITY OF POMONA].

Whereas, the Sunset Telephone and Telegraph Company, a corporation, is now, and during all the times herein mentioned was, engaged in local telephone business in the City of Pomona; and

Whereas, said Company obtained a right and franchise for telephone purposes only, from said City to enter and do business in said City for the period of ten years, on August 8th, 1888, as evidenced by Ordinance No. 30 of said City; and

Whereas, by the terms of said ordinance said franchise expired during the year 1898, and said Company now has no franchise nor any right from said City, nor at all to use, occupy or obstruct the streets of said City for telephone purposes; and

Whereas, the Trustees of said City have repeatedly requested and still request said Company to secure from said City such a franchise as will compel an observance of those or similar conditions contained in the franchise now held by The Pomona Valley Telephone and Telegraph Union, a corporation, so that there will be no dis-
28 crimination betwen the two Companies doing in competition a similar local or State business; therefore, be it resolved, that said Sunset Telephone and Telegraph Company be, and it is hereby notified to appear before this Board of Trustees on Thursday, June 15, 1905, at 7:30 P. M., at the City Hall, Pomona, California, to show cause, if any it has, why it should not obtain such franchise from said City, and upon its failure or refusal to immediately apply for and secure said franchise why the telephone poles and wires and apparatus of said Company should not be declared a public nuisance, and the Street Superintendent of said City be instructed to remove said poles, wires and apparatus from the streets of said City; and

Be it further resolved, that the City Clerk be instructed to serve a certified copy of this resolution upon the said Sunset Telephone and Telegraph Company at its office in Pomona, California.

EXHIBIT "2" [TO BILL OF COMPLAINT—OPINION IN SUNSET TELEPHONE & TELEGRAPH COMPANY VS. CITY OF EUREKA et al.].

In the United States Circuit Court, Ninth Circuit, Northern District of California.

No. 13248.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant.

vs.

CITY OF EUREKA et al., Defendants.

29 *Motion to Dissolve Restraining Order.*

This suit is brought by the Sunset Telephone and Telegraph Company, a corporation, against the City of Eureka, a municipality of the State of California, and the officials of that city, for an injunction to restrain and prevent their interference with the erection and maintenance of its telephone and telegraph lines, with the necessary appliances and appurtenances, in the streets of said city, and to prevent its officials from interfering with or removing the same, or instituting suits or prosecutions against the company or its agents, to prevent the construction of its lines, or the performances of its usual and ordinary business as a telephone and telegraph company, or from the collection of such rates for services rendered to sub-

scribers as are now established. Upon filing the bill a restraining order was issued as prayed for, and an order to show cause why the same should not be continued pendente lite, and the defendants have appeared and moved to dissolve the restraining order.

It is charged in the bill that the complainant has constructed, owns and is operating certain telephone and telegraph lines in the States of California, Oregon, Washington, Idaho and Nevada, by which it transmits both telegraph and telephone messages and communications between these states, also between the various cities and towns of each State upon the payment of certain rates, and that such messages and communications are sent by its patrons from the City of Eureka, and by them also received in said city. While it
30 is not claimed by complainant that all the patrons and subscribers of the company in the City of Eureka and doing business on its lines, actually send and receive messages and communications to and from points outside of the state, it is asserted that some of them do make such use of its instruments and lines, and that facilities are afforded for so doing to all such patrons and subscribers for telephones.

It appears that on September 4th, 1897, complainant duly accepted the provisions of the Act of Congress approved July 24, 1866, entitled: "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes," and is included in the list of companies published by the Postmaster General for which a schedule of rates for government business has been established by that official. It also appears that for several years before the present trouble arose between complainant and the City of Eureka, the company had, from time to time, by the permission of the city and in compliance with its regulations as to the method of construction, erected lines in various streets, and at the time of bringing this suit was operating a telephone exchange there with about seven hundred and fifty subscribers. That prior to this suit the City Council had passed certain ordinances regulating the manner of constructing telephone and telegraph lines in Eureka, which complainant had always complied with, and alleges its willingness to still so comply, or with any other reasonable regulations in that respect. The principal causes leading to this suit were
31 the passage of two ordinances by the City Council attempting to compel the company to maintain separate lines for its interstate business, and to procure a franchise from the city for the erection of lines used to transact local business. The first of these, No. 285, adopted Jan. 27th, 1902, is entitled an ordinance "Regulating telephone, telegraph and telephone poles and wires used in doing interstate business in the City of Eureka," and declares it to be unlawful for any person to erect or maintain any poles or wires in the streets of the city used for doing an interstate telephone or telegraph business, or both, without first obtaining permission therefor from the City Council, and complying with the provisions of said ordinance touching such erection and maintenance. It provides further, among other things, that it shall be unlawful to use any

poles or wires, the permission to erect or maintain which has been granted under the provisions thereof, for any purpose or purposes other than interstate telephone or telegraph, unless a franchise has been first obtained for doing an intrastate or local business within the city. The second, No. 286, adopted on the same day, is entitled an ordinance "Regulating telephone and telegraph and telephone poles and wires used in doing an intrastate telephone and telegraph business and local telephone business within the City of Eureka," and declares it to be unlawful to erect or maintain poles or wires in the streets to be used in doing intrastate telephone or telegraph business or local business in the City of Eureka, without first ob-
32 taining a franchise for so doing in accordance with the laws of the State and the charter of the city, and prescribes penalties for non-compliance therewith. About the time of the adoption of these ordinances another ordinance was passed, reducing the rates to be charged by the complainant in the city to an extent alleged to be unremunerative and prohibitory, and an injunction is also sought against its enforcement. Charges of fraud are also made concerning the motives of certain members of the council in securing the passage of these ordinances, but these are denied by affidavits read upon the hearing, and that issue will not be considered in passing upon this motion. Counsel for defendants did not insist upon the hearing that complainant should be prevented from collecting its present rates before the trial of the case, and the principal question left for decision upon this motion is as to the right of complainant to use and occupy the streets of the City of Eureka, to set poles and string wires, with all necessary and proper appliances and appurtenances for the purpose of its business, without first procuring a franchise from the city permitting such use and occupation. Counsel for the city have considered that under its charter and the laws of the State such a franchise is requisite, and that the city is entitled to the payment of a percentage upon the gross annual receipts of the company, as provided by the law of the state known as the "Broughton Act." (Stats. of Cal. 1901, p. 265.) No provision of the charter of Eureka has been pointed out under which a franchise may be granted by the city or be required by it, in order to enable a corporation like
33 complainant to erect lines for a telephone or telegraph business, and the liability, if any, of complainant to be compelled to procure such a franchise arises under this act of 1901. In any event it would be presumed that the charter of the city is subordinate to a general law on the subject. Section 1 of the Act of 1901 reads as follows:

"Section 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any city and county, city or town within this State, except steam railroads and

except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise."

It is contended on behalf of complainants that as all its lines are doing both an interstate telephone and telegraph business, they are not within the operation of the act. It is shown that telegraph messages are sent over these lines from persons in this State to persons in other States and received from the latter; also that telephone communications to and from the State are sent and received over the lines by some of the subscribers though not by all; but
34 that such use is open to any person renting a telephone instrument of the company, or applying to any of its public exchanges for telephone service. That all such services are rendered by complainant on the payment of established rates.

It has been repeatedly held that such intercourse by telegraph and telephone messages and communications between different States is interstate commerce.

W. U. Tel. Co. vs. Pendleton, 122 U. S. 356;
Muskogee Nat. Tel. Co. vs. Chicago, 118 Fed. 382;
In re Penn. Tel. Co., 20 Atl. 846;
N. W. Tel. Co. vs. Chicago, 79 N. W. 315.

It would seem that the legislature of California had in view the law as declared by these decisions when the act of 1901 was passed, and that the lines of complainant are, on this account, exempted from its provisions. If complainant could be compelled to apply for a franchise as a condition precedent to doing business, the granting body might refuse its application and instruments of interstate commerce be thereby prevented from transacting business; conditions might also be attached to such use which might impair or in effect work a denial of its exercise.

In re Wm. Henry Johnston, 137 Cal. 115, 120.

The Supreme Court of California had already declared when this act was passed that in the statutes of the state the word "telegraph" included the telephone.

35 Davis vs. Pac. States T. & T. Co. 127 Cal. 312.

The same construction has been placed upon similar statutes in numerous other instances.

Wisconsin Tel. Co. vs. Oshkosh, 62 Wis. 32;
San Antonio Ry. Co. vs. Southwestern T. & T. Co., 55 S. W. 117;
Peoples T. & T. Co. vs. Turnpike Road, 49 Atl. 284;
Wisconsin Tel. Co. vs. Sheboygan, 90 N. W. 441;
City of Rochester vs. Bell Tel. Co., 64 N. Y. S. 804;
Michigan Tel. Co. vs. Benton Harbor, 80 N. W. 386;
Summit Township vs. Telephone Co., 41 Atl. 146;
Telephone Co. vs. Railway Co., 52 S. W. 106.

This court will follow the interpretation placed upon a statute by the highest court of the State in which it was enacted.

Complainant has also invoked Section 536 of the Civil Code of California, and claims the right to construct its lines thereunder, and cites Davis vs. Pac. States T. & T. Co., 127 Cal. and other cases before noticed in that connection. Support is found for this claim in Abbott vs. Duluth, 104 Fed. 833; Northwestern Tel. Co. vs. Minneapolis, 86 N. W. 69, and other well considered cases.

Complainant further contends that as the lines which it constructed prior to the commencement of this suit were erected under ordinances of the city permitting such erection and particularly Ordinance No. 260 (Exhibit "B" to the Bill,) passed March
36 18, 1901, expressly accepting all pole lines erected by the company to that date, its relations with the city became contractual and cannot be annulled by any subsequent action of that body, and cites in support of this proposition:

Abbott vs. City of Duluth, 104 Fed. 837;
Telephone Co. vs. Minneapolis, 86 N. W. 69;
Sunset T. & T. Co. vs. Medford, 115 Fed. 202;
New Orleans vs. Southern Tel. Co., 40 La. Ann. 41
Wisconsin Tel. Co. vs. Sheboygan, 90 N. W. 441;
Northwestern Tel. Co. vs. Minneapolis, 86 N. W. 74;
Chesapeake Tel. Co. vs. Baltimore, 45 Atl. 446;

—which seem to sustain this contention. It is also urged further on behalf of complainant, that having lawfully established its lines in that city, it has the right, as an incident to this circumstance, to extend such lines, with all necessary and proper appliances and appurtenances, to accommodate the increasing demands for telephone service, according to the doctrine announced in

Abbot vs. Duluth, 104 Fed. 839;
Mich. Tel. Co. vs. St. Joseph, 80 N. W. 383.

But under the view taken of the Act of 1901, it is not necessary to pass upon these points.

Of course a telegraph and telephone corporation engaged in conducting an interstate business would be required to conform to all reasonable police regulations adopted by municipal authorities as to the manner of constructing and maintaining its lines. This
37 proposition is conceded by counsel for complainant, and it is pointed out that this company has always discharged its obligations to the city of Eureka in this respect, and has expressly alleged in the bill that it is willing to do so hereafter. This protects the public against any misuse of the streets.

The motion to dissolve the restraining order is denied.

BEATTY, *Judge.*

July 18, 1902.

[Endorsed:] Filed July 18, 1902. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

EXHIBIT "3" [TO BILL OF COMPLAINT—RESOLUTION OF BOARD OF TRUSTEES].

Resolution Declaring Posts, Wires and Apparatus of Sunset Telephone-Telegraph Company an Obstruction and Public Nuisance.

Whereas, the Sunset Telephone-Telegraph Company, corporation, by a resolution duly adopted June 6th, 1905, a certified copy of which was served on said Company cited said Company to appear before this Board of Trustees on Thursday, June 15th, 1905, at 7:30 P. M., at the City Hall, Pomona, California, to show cause, if any it has, why it should not obtain a franchise from said City for the purpose stated in said resolution and citation, and upon default thereof why the telephone poles, wires and apparatus of said Company should not be declared a public nuisance and removed from the streets of said City; and

38 Whereas, at the time and place appointed said Company failed to make any appearance in response to said resolution, and no showing at all having been made justifying its obstruction and occupancy of the streets of said City by said Company.

Therefore, Be it Resolved, that the telephone poles, wires and apparatus of said Sunset Telephone-Telegraph Company employed in doing state and local telephone business within the City of Pomona, (and not including poles, wires and apparatus used exclusively for telephone business done to or from points without the state, and not including any poles, wires and apparatus used exclusively for telephone business done for the government of the United States, its officers or agent, if any), be and all of them are hereby declared to be an obstruction and a public nuisance on all the streets of said city; and,

Further Resolved, that the Street Superintendent of said City be and he is hereby instructed to forbid and prevent any future installation, or extension of said telephone poles, wires and apparatus; and,

Further resolved, that unless said Company obtains such a franchise from said City within thirty (30) days from date hereof, that the Street Superintendent of said City be and he is hereby further instructed to remove all said telephone poles, wires and apparatus from the streets of said City.

The passage of this resolution is to be deemed a further notice to said Company, and to give it an opportunity and thirty days more time in which to remove its said telephone poles, wires and

39 apparatus from the streets of said City.

The City Clerk shall certify to the passage of this resolution and shall cause a certified copy of the same to be served upon said Sunset Telephone-Telegraph Company at its office in Pomona, California.

EXHIBIT "4" [TO BILL OF COMPLAINT]—STREET SUPERINTENDENT'S NOTICE.

To Sunset Telephone and Telegraph Company, a Corporation:

In accordance with the instructions of the Board of Trustees of the City of Pomona, contained in its resolutions to the Sunset Telephone and Telegraph Company, made and dated respectively June 6th, 1905, and August 1st, 1905, and the laws in such cases made and provided, prescribing the powers and duties of Street Superintendent, the following notice is hereby given said Sunset Telephone and Telegraph Company.

Under said resolutions and by virtue of the powers and duties of the office of Street Superintendent of said City, you are hereby notified that in accordance with the facts and conclusions stated in said resolutions, which are hereby made the facts and conclusions of the undersigned Street Superintendent, all the poles, wires and apparatus of said Company employed in doing a state and local telephone business within the City of Pomona, are hereby declared a public nuisance and obstruction upon all the streets of said city, and hereby ordered to be removed from all the streets of said city within thirty days from August 1st, 1905, or I shall immediately proceed to remove the same.

You are expressly and particularly notified that I will remove only the poles, wires and apparatus of said Company doing a State and local telephone business within said city; and that I will not remove or in any manner interfere with, but as to such removal, will "except telegraph or telephone lines doing an interstate business," if any, and will also except from the order of removal all the poles, wires and apparatus of said Company doing said "interstate business," if any.

In event you do not voluntarily remove said poles, wires and apparatus doing said state and local telephone business, within said period of thirty days from August 1st, 1905, then you are hereby solicited now and before said period of thirty days expires to co-operate with me and assist in the designation of the poles, wires and apparatus, of said Company doing said State and local telephone business, and in all other matters and things whatsoever, so that there will be no mistake and as little inconvenience as possible to said Company and the public; also I desire at same time the designation by you of a place in which to put said poles, wires and apparatus.

The words "Telephone" and "Telegraph" are not used synonymously, but according to their popular meaning and distinction.

S. C. SLEMKER,
Street Superintendent of the City of Pomona.

Dated August 10th, 1905.

41 EXHIBIT "5" [TO BILL OF COMPLAINT—NOTICE SERVED UPON STREET SUPERINTENDENT].

SAN FRANCISCO, CAL., *August* 29, 1905.

Mr. S. C. Slemker, Street Superintendent, City of Pomona, Pomona, Cal.

DEAR SIR: Referring to the notice left by you on the 11th inst. with Mr. Frank Smith, Manager of the Sunset Telephone and Telegraph Company at Pomona, Cal., ordering the removal of certain poles, wires and apparatus of said Company from the streets of the City of Pomona:

You are hereby respectfully informed that said Sunset Telephone and Telegraph Company is a corporation and the owner of all said poles, wires and apparatus in said City mentioned in this notice, and that the whole thereof have been used, and are now being and will continue to be used, and are all susceptible of being used, for the purposes of interstate business, and are each and all instruments of interstate commerce, and have been used, now are and will continue to be used, and are all susceptible of being used, for such commerce.

You are further advised that all said lines are used by the United States Government, as well as by individuals, for business purposes, and that any interference with or interruption of said lines, poles, wires or apparatus, or any of them, on your part will be reported to the proper officials for proceedings under the United States laws.

You are also notified that the Sunset Telephone and Telegraph Company will hold you responsible for all injuries or interrup-
42 tions on your part to any of its said property, and for all damages to its business resulting therefrom, and will also hold the members of the Board of Trustees of the City of Pomona, and said City of Pomona, liable for any such injuries, interruptions or damages.

SUNSET TELEPHONE AND TELEGRAPH COMPANY,

[SEAL.] By JNO. I. SABIN, *President.*

Attest:

F. W. EATON, *Sec'y.*

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit Southern District of California, Southern Division. Sunset Telephone and Telegraph Co. vs. The City of Pomona, et al. Bill in Equity. Filed Sep. 5, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Solrs. for Complainant, Union Trust Building, San Francisco.

43 [*Subpœna.*]

UNITED STATES of AMERICA:

Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

In Equity.

The President of the United States of America, Greeting to the City of Pomona, a Municipal Corporation in the County of Los Angeles, State of California; the Board of Trustees of the said City of Pomona; Mel. Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slemker, as the Superintendent of Streets, in and for said City of Pomona; S. C. Slemker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe:

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Los Angeles, on the 2d day of October, A. D. 1905, to answer a Bill of Complaint exhibited against you in said court by the Sunset Telephone and Telegraph Company, a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the town of Martinez, in
44 the County of Contra Costa, in said State, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of September, in the year of our Lord, one thousand nine hundred and five, and of our Independence, the one hundred and thirtieth.

[SEAL.] WM. M. VAN DYKE,
Clerk,
By CHAS. N. WILLIAMS,
Deputy Clerk.

Memorandum Pursuant to Rule 12, *Supreme Court U. S.*

You are hereby required, to enter your appearance in the above suit, on or before the first Monday of October next, at the Clerk's office of said court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

WM. M. VAN DYKE,
Clerk,
By CHAS. N. WILLIAMS,
Deputy Clerk.

Clerk's Office: Los Angeles, California.

UNITED STATES MARSHAL'S OFFICE,
Southern District of California.

I hereby certify, that I received the within writ on the 5th day of September, 1905, and personally served the same on the 5th day of September, 1905, on City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, J. F. Ulery,
45 R. G. Loucks and S. C. Slanker, by delivering to and leaving with Mel Campbell as Pres. of Board of Trustees; Mel Campbell, N. W. Miller, L. R. Matthews, Joseph Douglas and J. F. Ulery as Trustees; R. G. Loucks individually and as City Attorney; S. C. Slanker, individually and as Street Superintendent, said defendants named therein, personally, at the County of Los Angeles, in said district a copy thereof.

H. Z. OSBORNE,
U. S. Marshal.
By WM. I. TRAEGAR,
Deputy.

Los Angeles, Sept. 7th, 1905.

[Endorsed:] Original. Marshal's Doc. No. 798. No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. In Equity. Sunset Telephone and Telegraph Company, Complainant, vs. The City of Pomona, et al., Defendants. Subpœna. Filed Sep. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

46 In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation, Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Answer of Certain Respondents to Complainant's Bill.

To the Honorable the Justices of the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, Sitting in Equity:

Come now the City of Pomona (a municipal corporation) and the Board of Trustees of said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker (improperly sued herein as S. C. Slemker), as the Superintendent of the streets in and for the said City of Pomona, R. G. Loucks, as City Attorney of said City of Pomona, and S. C. Slanker (improperly sued herein as S. C. Slemker), and R. G.

Loucks, respondents in the above-entitled case, and making
47 answer to the bill in equity filed against them in the above-entitled cause, now and at all times hereafter, saving unto themselves, and each of them, all and all manner of benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, do say, deny and allege as follows, to wit:

I.

Admit that complainant is and at all the times in this bill of complaint mentioned was a corporation organized and existing under and by virtue of the laws of the State of California; but these respondents allege that they have not sufficient information, knowledge or belief to enable them to answer any of the allegations contained in paragraph I of said bill of complaint, which are hereinafter denied, and therefore, and basing their answer on such ground, deny said allegations, and so denying, do deny that said complainant is a telephone or telegraph company, or a telephone and telegraph company, or that it was at all or at any time authorized or empowered by its articles of incorporation to do a general telephone and telegraph or a general telephone or telegraph business, or that as such corporation, it has constructed or established, or now maintains or operates extensive telephone or telegraph lines or poles, or system, or apparatus, or appliances for the purpose of transmitting intelligence by electricity through means of telegraph instruments, or through means of telephone or telegraph instruments, in
48 either the States of California, Oregon, Washington, Idaho or Nevada, and for the same reasons, and so denying, deny that at any time in the transaction of its business, or as a part thereof, or by the use of its said systems, or by the use of any systems, complainant transmits and delivers or transmits or delivers by means of its said lines, or by any means whatsoever, telephonic messages or telegraphic communications originating at any point inside or outside of the State of California, either to the points or places within said City of Pomona, or to any other points or places within said State, or that said complainant, by any means whatsoever, transmits any messages or communications to or from the said City of Pomona, or between different places within the said City of Pomona (or between different places within the said City of Pomona) by means of said telegraphic instruments, or by means of any other instruments or appliances whatsoever, other than by what is known as the local telephone system, viz.: its system of communications by articulate speech, within said City of Pomona, said communications being made by the party sending the communication directly through the telephone instrument and telephone appliances to the party receiving the message, and the same being by articulate speech, and not otherwise.

These respondents admit that ever since the 6th day of January, 1888, the said City of Pomona is and has been a body politic, a corporation of the fifth class, organized and existing under and

by virtue of the laws of the State of California, and forming a
49 municipal corporation of and in said State of California, in the County of Los Angeles, said State by the name and style of the City of Pomona.

Admit that the respondents, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery are now and ever since the — day of April, 1905, have been the duly elected, qualified and acting Board of Trustees of the said City of Pomona and have constituted, and do now constitute, the said Board of Trustees;

Admit that the respondent, S. C. Slanker (sued herein as S. C. Slemker), now is, and ever since the — day of January, 1905, has been, the duly elected, qualified and acting Superintendent of Streets of said City of Pomona;

Admit that the respondent, R. G. Loucks, now is, and ever since the — day of January, 1905, has been the duly elected, qualified and acting City Attorney of the said City of Pomona, and that all of said respondents will hold office during the year 1905;

Admit that these answering respondents are and each of them is a citizen and resident of the State of California, and of the Southern District of said State.

II.

Allege that these respondents have not, nor has either of them, sufficient information, knowledge or belief to enable them to answer any of the allegations contained in paragraph II of said bill of complaint, and therefore, and basing their an-
50 swer on such ground and for said reasons, these respondents deny each and every allegation in said paragraph contained, and deny that on the 4th day of December, 1897, or at any other time, complainant in writing or otherwise, without reservation or at all, accepted the restrictions, or obligations of the Act of Congress approved July 24, 1866, entitled: "An Act to aid in the construction of Telegraph Lines and to Secure to the Government the use of the same for Postal, Military and Other Purposes," or that thereafter, on the 14th day of December, 1897, or at any other time, complainant filed said written consent with the Postmaster-General in any manner, or at all, or as provided by said act, or that said Postmaster-General, certified in writing that said acceptance was on said 14th day of December, 1897, or on any other day filed in the office of said Postmaster-General, or that at the time of said acceptance or filing, complainant was using, or ever since, or at any time has used, any of its lines, particularly the lines described in said bill of complaint, which are within the corporate limits of said City of Pomona, for telegraphic purposes, or for sending or transmiting messages thereon by means of or through the means of telegraphic instruments, consisting of an ordinary key, relay or sounder, or by means of the Morse signals.

And these respondents allege that said complainant is carrying on a local telephone business, and that if under any circumstances or conditions, it did file with the Postmaster-General an accept-

ance in writing as alleged in said paragraph II, that the
51 same was but a subterfuge, and was not done in good faith, but was done for the purpose of giving the said complainant an opportunity of claiming that it was carrying on a telegraph business, and thereby give to its telephone business rights and privileges which said complainant, as a telephone corporation pure and simple, could not have, and that the said complainant did not in good faith accept any reservation or restrictions or obligations contained in or provided for by said Act of Congress of July 24, 1866, and particularly with any view of expectation on the part of the said complainant, that it would ever or at any time be called upon by the Government of the United States to receive, transmit, send or deliver telegraphic messages, or any messages whatsoever, and that said complainant at all times well knew that it was filing said written assent and consent, if the same ever was filed by it, as a mere subterfuge and blind, and for the purpose of giving it an apparent but not a real right to bring and prosecute actions, on the theory that it was a telegraph company doing a telegraph business, with obligations to the United States Government to receive, transmit and deliver interstate telegraphic messages for the said Government, as provided by said Act, and these respondents allege that the said subterfuge, misconduct and fraud on the part of said complainant is now presented to this Court by the said bill of complaint for purposes of misleading this Court and of causing this Court to conclude
52 and believe that the said complainant is a telegraph company conducting a telegraph business, whereas, and in fact, as these respondents are informed and believe, and so allege, the said complainant is a telephone company, and that if the said complainant uses telegraph instruments in connection with its wires and in connection with its business, it is for the purpose of sending messages on its own business and to its own employees, and not otherwise.

And in further evidence of the lack of good faith of the said complainant and of the fraud of said complainant in bringing this action, these respondents allege that it is a fact, and at all times was known by said complainant to be a fact, that none of the respondents herein were at any time cutting down or interfering with, or at any of the times alleged in the complaint threatening to cut down, destroy or interfere with any wire or lines of the said complainant leading into or out of the said City of Pomona, which at any time was ever used by the said complainant transmitting any message, whether by articulate speech or telegraphic instruments between the said City of Pomona and any outside place, either in the State of California or other place, but the said complainant at the time of filing its said complaint, well knew that these respondents had not, and were not, threatening or intending to cut down, destroy or interfere with any poles, wires or other appliances of the said complainant within the said City of Pomona, except those used exclusively in a purely local telephone business connecting individual subscribers and
53 their places of businses and their places of residence with the telephone exchange of the said complainant in the said City

of Pomona, and that none of these respondents had, nor were they threatening to cut down, destroy or interfere with any pole, line or wire by means of which any telegraphic communication had ever been, or could be, sent or transmitted by telegraphic instruments, such as are described in paragraph II of said bill of complaint, and the said complainant at the time of filing its said bill and prior thereto, well knew that none of these respondents had interfered with or destroyed, or intended to interfere with or destroy any of the lines or poles or instruments or other appliances of the said complainant, through or by means of which any telegraphic message could be sent from the said City of Pomona to any other place whatsoever, whether within the State of California or elsewhere, and these respondents therefore again allege that the said bill of complaint was not filed nor the said action brought in good faith, or with the intent on the part of the said complainant that equity should be done, and the said complainant has not come into this court of equity with clean hands, but has come with fraud and an intent to deceive this Court and mislead this Court in order that the extraordinary remedy of injunction might be granted to it by this Court, restraining and enjoining these respondents, and particularly the City of Pomona, from doing that which under the laws of the State of California and of the Government of the
54 United States, it has a right to do, and which under the said laws, it is its duty to do and perform.

III.

These respondents deny that the said complainant for a period of more than ten years prior to the first day of September, 1905, or at any other time, had constructed or was constructing, or had maintained or operated or conducted a business in the City of Pomona such as is described by it in its bill; on the contrary, these respondents allege that the business which the said complainant has carried on with the said City of Pomona, with the acquiescence and consent of the said City and the Board of Trustees thereof, was the business of constructing, maintaining and operating a telephone system and plant, with a central telephone exchange, and these respondents allege that said business was carried on, and the said plant constructed, maintained and operated under and by virtue of a franchise of the said City of Pomona granted to said complainant at its request, as will hereinafter be more fully alleged and set out and not otherwise, and these respondents deny that the said complainant has carried on any business in the City of Pomona, or has erected, maintained or operated any plant or appliances within the said City under or by virtue of the provisions of the said Act of Congress approved July 24, 1866; on the contrary, these respondents allege and state that the said complainant erected, maintained and operated its poles, arms and other apparatus and appliances in, over and along the roads, streets and highways of the said City of Pomona
55 under and by virtue of the franchise hereinafter particularly described granted by the said City of Pomona in the year 1888 and not otherwise.

Respondents deny that the streets, roads, alleys or highways of the said City of Pomona at any time were or are now being used as open post-roads of the United States, except as streets, alleys and highways are used by the postoffice employees of the United States in common with other people and the general traveling public.

These respondents deny that the lines, poles, arms, insulators, wire or other apparati, fixtures or appliances erected and heretofore used by the said complainant in the roads, streets, alleys and highways in the said City of Pomona did not interfere with the use of the said streets, alleys and highways; on the contrary, these respondents allege that the said poles, wires, arms and other apparati, constructed, erected, maintained and operated by the said complainant in and along the roads, streets, alleys and highways of the said city of Pomona, and particularly all of the said poles and other appliances used in connection with the local telephone exchange business in said city, do obstruct said streets, roads and alleys and constitute nuisances therein.

These respondents deny that complainant has always maintained or operated or that at the time of the filing of its said bill of complaint, it did maintain or operate, or that at any time since said date, it has maintained or operated its said lines under or pursuant to law,
or as it has or had the right to do; on the contrary, these
56 respondents allege that ever since the expiration of the said franchise hereinafter more particularly described, to wit: ever since the month of August, A. D., 1898, the said complainant has maintained and operated and is maintaining and operating its poles, lines, wires and telephone plant and system in and along the public roads, streets, alleys and highways in and of the said City of Pomona contrary to law and in violation of law, and in violation of the rights and privileges of the said City of Pomona and the inhabitants and citizens thereof, and that said facts, ever since the said month of August, 1898, have been known and at the time of the filing of its bill of complaint herein were known by the said complainant, and the said complainant in that behalf, as well as otherwise, is knowingly setting forth in its bill to this Court, statements which are untrue.

These respondents allege that they have not, nor has either of them sufficient knowledge, information or belief to enable them to answer any of the allegations contained in that part of paragraph III of said bill of complaint commencing with the beginning of line 25, page 5, of the said bill and ending with line 24, page 6, of said bill, and therefore, and basing their answer on such grounds and for such reasons, these respondents deny, that ever since the 14th day of December, 1897, or since any other date whatsoever, complainant, pursuant to the terms of the said act of Congress of July 24, 1866, or otherwise, or at all, has accepted or does now accept, or will con-
tinue to accept all or any telegrams between the several de-
57 partments of the Government of the United States and their officers and agents tendered to it for transmission over all or any of its lines at rates annually fixed by the Postmaster-General of the United States or at all, or that the complainant ever since said

14th day of December, 1897, or at any other time, has given or does now give or will continue to give all or any such message or messages priority over all other business, or that it has on file in its office for the information of its various officers or agents in the transmission or transaction of telegraph business for the Government of the United States, a schedule of rates entitled: "Schedule of Rates for Government Telegrams," issued by the Postmaster-General on August 5, 1904, or that annexed to said schedule issued by said Postmaster-General, is a list entitled: "Telegraph Companies which have accepted the conditions of the Act of July 24, 1866, and which are subject to the Provisions of the Order of the Postmaster General fixing Government rates," or that the name of complainant appears in said list as set forth in said bill of complaint as follows: "125. The Sunset Telephone and Telegraph Company. John I. Sabin, President, San Francisco, Cal. Received and filed December 14, 1897," or that complainant always has been or now is ready or willing on application by any officer of the State of California or the United States, either in case of war, insurrection, riot or other civil commotion, or resistance of public authority, for the prevention or punishment of crime, or for the arrest of persons suspected or
58 charged therewith, to give to the communications of such officers immediate dispatch at the price of ordinary communications of the same length.

These respondents allege that the said allegations so last above denied, contained in the said paragraph III, are inserted in the said bill of complaint for the purpose of leading this Court to believe that the officers of the several Departments of the Government of the United States and their officers and agents have interchanged and sent telegrams from one to the other over the lines of the said complainant, whereas, these respondents allege that they are informed and believe, and on such information and belief allege and state the facts to be that said allegations are subterfuges and are intended to mislead this Court because of and for the reason that, as these respondents are informed and believe and so allege, the said complainant has never been called upon to accept or transmit any telegraphic message between any Departments of the Government of the United States and any other department of any offices or agent of said Government, or any telegraphic message whatsoever on the part of or for or by any officer of the Government of the United States or the State of California in his public capacity as such.

IV.

These respondents admit all the allegations contained in paragraph IV of said bill of complaint, except the last part of said paragraph IV, commencing with the word "that" on line 6, page 8, and ending with line 12, page 8, of said bill of complaint. These re-
59 spondents admit that on said 30th day of August, 1905, a notice was served upon said respondent, S. C. Slanker, as Street Superintendent of the City of Pomona, by the President of said Complainant Company, but these respondents deny that said President

was empowered or authorized to serve said notice, or that said complainant authorized or instructed the service of said notice, or that said complainant had the right, power or authority to order or authorize the service of said notice on said Street Superintendent.

Your respondents, with reference to the matters and things alleged and set out in said paragraph IV, further allege that the true and only facts concerning said matters are as follows, to wit, and not otherwise:

Pursuant to a resolution of the Board of Trustees of said City of Pomona, passed June 6, 1905, E. S. Pillsbury of San Francisco, California, and Wm. E. Dunn, of Los Angeles, California, two of the attorneys for said complainant company, appeared before said Board of Trustees on July 19, 1905, in answer to said resolution passed June 6, 1905, and to show cause why said complainant company should not obtain a franchise for constructing, maintaining and operating its local telephone business within said City of Pomona, and then and there a debate and discussion as to the legal points involved was had between the said E. S. Pillsbury and said respondent R. G. Loucks, City Attorney, which debate and discussion was in the presence of said Board of
60 Trustees in regular meeting assembled and lasted for two hours, whereupon, and thereafter, and after full deliberation and consideration said Board of Trustees decided that said complainant company had no franchise rights or any right whatever to do business in said City, and on August 1, 1905, said Board of Trustees duly passed its resolution of that date declaring the poles, wires and apparatus of said complainant a public nuisance and an obstruction on the streets of the said City of Pomona.

That on said July 19, 1905, and prior and continually since complainant has ignored and disobeyed the legislative wish of said Board of Trustees and has been and now is in contempt of said City of Pomona, its Board of Trustees, and citizens and inhabitants. The said resolutions referred to herein of dates June 6, 1905, and August 1, 1905, are the same resolutions referred to in said paragraph IV of complainant's bill of complaint and annexed to said bill as Exhibits "1" and "3."

V.

These respondents deny that in order to conduct a telegraph business either by itself, or in connection with the telephone business of complainant in the said City of Pomona, or to meet the demands of said city for telegraphic services, it has been necessary for complainant to erect, construct or maintain, or that it has erected, constructed or maintained any telegraph or telephone lines, or any lines whatsoever in any of the public streets, alleys or avenues of the said City of Pomona; on the contrary, these respondents allege that every pole and line erected by said complainant in or along any public
61 street, alley or avenue in said city was erected by it and has been maintained and operated by it in connection with its telephone business and for the purpose of carrying on its telephone business and to meet the demands of the City of Pomona

for telephone service and not otherwise, and that said complainant would not have erected and did not erect and would not have constructed and did not construct, and would not have maintained and did not maintain, any lines in said City of Pomona for the purpose of carrying on or conducting a telegraph business, or for the purpose of meeting any demands of the respondent, the said City of Pomona for telegraphic services or the carrying of messages by telegraphic instruments, and these respondents deny that the said complainant has erected, constructed or maintained; or does now erect, construct or maintain any pole, arm, insulator, wire or other apparatus, fixture or appliance in any street, alley or avenue of said City of Pomona for the purpose of conducting a telegraph business either by itself or in connection with its telephone business, but that as hereinabove alleged and set out, the said parts and appliances were erected, constructed and maintained by said complainant for the purposes alone of a telephone business and that the use by it of the term "Telegraph" in the said complaint, and particularly in paragraph V thereof, was a subterfuge and a fraud and for the purpose, and intended as such by said complainant, of misleading this Court into believing that it did in fact conduct, carry on, maintain and operate a telegraph business in said City of Pomona and particularly interstate
62 telegraph business in connection with which, telegraph messages were, have been and are transmitted from and to the said City of Pomona to and from places and cities in the United States outside of the State of California; and these respondents deny that the said complainant has ever constructed, operated or maintained any telegraph wires, poles or other apparatus by or with the consent or knowledge of the said City of Pomona or of its Board of Trustees, or in conformity with any rules or regulations of said City or of said Board, or with the knowledge or consent of said City or of said Board, or of any officer of said city, or at all.

VI.

Respondents deny that the complainant at the time of filing its bill of complaint, or at any other time, by or with the consent and acquiescence of said City of Pomona, operated or maintained, or that it has operated or maintained any telegraph system whatsoever in the said City of Pomona.

These respondents admit that up to the expiration of the franchise hereinbefore referred to and hereinafter more particularly described, the said complainant did operate, maintain and carry on a public telephone business in the said City of Pomona with the consent and acquiescence of said city, as expressed in and by the ordinance granting the said franchise, but not otherwise, and that ever since the expiration of the said franchise, the carrying on, conducting, maintaining and operating of the said telephone business and of the different and several telephones and telephone lines in the said City of Pomona by the said complainant, has been without the con-
63 sent or acquiescence of the said city or by any board or body authorized to give such consent or acquiescence, and has been without law and without right.

Respondents deny that each and all of the telephones described in paragraph VI of said bill of complaint is connected with the entire system of complainant, except through and by means of what are known as long distance wires connecting the said City of Pomona and complainant's telephone exchange therein with other places and other telephone exchanges; and these respondents allege that they are informed and believe and on such information and belief allege and state the facts to be that said long distance wires and all of the same, at all of the times mentioned in complainant's bill of complaint, were and now are being maintained, operated, owned and controlled by a certain corporation known as the Pacific States Telephone & Telegraph Company, a corporation, and not by complainant, and that each and every subscriber to the telephones described in paragraph VI, who used the said long distance wires, or any thereof, use the same solely by means of the telephone, and transmitting their messages by articulate speech, and that each of said subscribers are charged therefor by the said Pacific States Telephone & Telegraph Company, and are obliged to pay the Pacific States Telephone & Telegraph Company for such use and for such service, as the same is performed, and that the said complainant at none of the times mentioned in said bill of complaint has operated or controlled or maintained the said long distance wire or charged for the use
64 thereof, or rented the same.

These respondents allege that they are informed and believe and on such information and belief allege the fact to be that no messages are or can be transmitted from any point in the City of Pomona to any place without said City, and particularly to any place in any State other than the State of California, by means of long distance wires owned or operated by the said complainant, and that the said complainant has not, during any time since 1898, owned, maintained, or operated any wires or other apparati by means of which long distance messages have been sent out of or into said City of Pomona.

These respondents deny that the action of the Board of Trustees of the said City of Pomona or of the said Superintendent of Streets, or other officer thereof, described in said bill of complaint, or any action by said board or by said superintendent of streets, or by any member thereof, is or was an attempt to regulate commerce between the several States, or that the same is or was a violation of any of the provisions of Subdivision 3 of Section 8 of Article 1 of the Constitution of the United States or of any other provision of said Constitution, or that the same is unlawful or void; and these respondents deny that the said telephone business of complainant conducted and carried on by it in the said City of Pomona, is or ever was an interstate business, and deny that the action of the said Board of Trustees is or was an unlawful or unwarranted interference with or an attempted regulation of said or any interstate business. Deny that the
65 said action of said Board of Trustees is in violation of provisions of Subdivision 1 of Section 10 of Article 1 of the Constitution of the United States, or of any other provision thereof; and these respondents deny that within ten years next preceding the 6th

day of June, 1905, complainant either by right or otherwise, except within and under the provisions of said franchise hereinabove referred to, and hereinafter more particularly described, has erected, placed, constructed, maintained or operated at any time its poles or lines of wire with the necessary arms, apparatus and fixtures of appliances used in connection therewith, over or along the streets, alleys, avenues or highways of said city (except the same was done prior to the month of August, 1898), except in violation of law and other right and without the consent or acquiescence of said City of Pomona or of its Board of Trustees or of any other board or officer of said city empowered by law to give acquiescence or consent.

And these respondents allege the fact to be that any work of construction or otherwise, or any expenditure of money made in the erection, construction, maintenance or operation of any poles, wires, apparatus, or appliances by the said complainant in the said City of Pomona, along any of its streets, avenues or alleys subsequent to the said month of August, 1898, was without right on the part of said complainant, in violation of law and against the rights of the said City of Pomona and of the inhabitants and citizens thereof, and

66 that ever since said month of August, 1898, the said complainant has and does now maintain, operate and construct public nuisances in, along and over and across the said public streets, avenues and alleys of the said City of Pomona by means of and by and with the poles, arms, wires, apparatus and appliances described by the said complainant in its said bill of complaint, as having been erected, constructed, maintained and operated by it, over, along and across the said streets, avenues, and allews, and that by means of the said poles, arms, wires, apparatus and appliances the said complainant ever since the said month of August, 1898, has maintained, and is now maintaining public nuisances in, along, across and over the several public streets, avenues and alleys and highways of the said City of Pomona and which public nuisance and nuisances your respondents pray this Court to abate, and your respondents will ask at the conclusion of this, their answer, and by its prayer herein, relief against the said complaint that the said nuisances be abated and the said complainant be ordered to remove the said poles, wires, arms, apparatus and appliances from the said streets, alleys and avenues, and will ask that the complainant be forever enjoined and restrained from either maintaining, erecting or operating any of said poles, arms, wires, apparatus or appliances along, in, over or across any of the said streets, avenues or alleys.

These respondents deny that any action or threatened action of the Board of Trustees alleged, described or set out in said bill of com-

67 plaint and particularly the actions of said Board referred to in said paragraph VI of said bill, impairs the obligations of any contract, particularly of any contract entered into between the said City of Pomona and said complainant; and these respondents deny that there is now or at the time of the commencement of this action, or at any time since the month of August, 1898, there has been any contract whatsoever existing between the said City of Pomona and the said complainant; and deny that since the said

month of August, 1898, the said complainant has had any contract or other rights in, over or across the streets, alleys, or avenues of said city to erect, maintain or operate any telephone or telegraph system whatsoever.

These respondents deny that on or about the — day of ——, 1903, complainant had constructed or operated its telephone or telegraph system without any special franchise or privilege; on the contrary, these respondents allege that the said system (the same being a telephone system and not a telegraph system) was constructed, operated and maintained under a special franchise granted in the month of August, 1888, and expiring in the month of August, 1898, as hereinafter more particularly alleged and set forth.

These respondents admit that ever since before the year 1903, a controversy and contention has continuously existed and been carried on between the said complainant and the said City of Pomona as to the rights of the said complainant to maintain or operate or construct or build its telephone system in the said city, unless it applied for and procured a special franchise for so doing,
68 because of and for the reason of the fact that the special franchise theretofore owned by it had expired.

These respondents deny that in consideration of any act or concession or acquiescence or consent by or on behalf of the said City of Pomona, the said complainant removed any of its lines, poles or wires from off or along Second Street of the said city; on the contrary, these respondents allege that on the 25th day of February, 1903, the Board of Trustees of said city at a regular meeting of said board, and as a matter of police regulation, passed and adopted a resolution of intention instructing the City Attorney of said city to prepare an ordinance for presentation to the said Board of Trustees for adoption by it at a subsequent meeting, wherein and whereby the poles, wires and lines along the paved portion of said Second Street were to be removed, and which said ordinance would affect all persons and corporations alike having wires, poles or arms along said paved portions of said Second Street. That immediately upon the adoption of said resolution of intention or instruction and the subsequent proceedings by said Board of Trustees and the Superintendent of Streets of said city, and without waiting for the said ordinance to be properly introduced or adopted, said complainant, in common with others and other persons and other corporations, then maintaining and operating poles, wires, telephone and telegraph lines and other lines along said paved portions of said
69 Second Street, began the removal and removed the same to other streets and alleys of said City of Pomona.

And these respondents deny that the said complainant removed its poles or wires or any other part of its system under any agreement or contract of concession or consent whatsoever, or that it agreed so to do in consideration of any concession, acquiescence or consent being given, extended or granted to it by the said City of Pomona or by the said Board of Trustees; and these respondents deny that any proposition of any kind or character with reference to the removal by the complainant of its poles and lines within the

said paved portion of said Second street was ever made by said complainant to said Board of Trustees of said city, or was ever accepted by the said board. And deny that thereupon or under any such offer or acceptance, complainant removed its lines from the said paved portion of said Second Street, or from any other locality whatsoever, or that it rebuilt the same upon any other street or alley under any other proposition or offer made to the said Board of Trustees or accepted by the said board, and in that regard and in that behalf, these respondents allege the fact to be that the said paved portion of said Second Street is the main business street of the said City of Pomona, and that the poles and lines and other appliances, at the time of the adoption of the said resolution of intention and instruction and proceedings owned by the said complainant and by said other persons and corporations, constituted a menace to the said city and the property of the residents thereof,
70 and that it was necessary as a police regulation at that time that said poles and line should be removed from said portion of said Second Street, which facts were so apparent that each and every owner of any of said lines, poles and appliances, including the complainant herein, immediately and without waiting for the passage or adoption of said ordinance removed their said several poles, lines and appliances therefrom to other streets and alleys within said city.

Respondents deny that at any time under any contract or accepted proposition or otherwise prior to or since the 5th day of May, 1904, or prior to or since the 6th day of June, 1905, complainant has maintained or operated its telephone or telegraph system or telephone and telegraph system in said City of Pomona, and deny that it has either operated or maintained or constructed either a telegraph or telephone system or both in said City of Pomona, under any contract, or agreement whatsoever with the said City of Pomona, or of any accepted proposition other than of said franchise of August, 1888.

Respondents deny that more than two years prior to June 1st, 1905, or at any other time, said City of Pomona contracted and agreed with complainant that if it would remove certain or any of its lines in said city or reconstruct the same at other places or at all, the said city would either recognize or admit the right in complainant to maintain or operate its telephone and telegraph system or telephone or telegraph system in said city or at all without any interference, let or hindrance, or without being requested or compelled to apply for a franchise from said city for the conduct
71 of said business, or that said complainant has kept or performed any agreement or condition on its part or that it had kept or fully performed the same prior to May 5, 1904; and the respondents allege, as this Court well knows and as complainant and its several counsel well know, that neither the said City of Pomona nor the said Board of Trustees thereof nor any members of said board at any time had or has any right, power or authority whatsoever to grant or concede any such right or privileges as are claimed and set forth in that portion of paragraph six of said com-

plaint, commencing with line 27, page 9, thereof, and ending with line 3 of page 13 thereof, being all of the last three pages and more of said paragraph six, and that said complainant and its said counsel at the time of the filing of said bill, well knew that the allegations so made and stated by it were not made in good faith or with the idea or belief on the part of said complainant that any such contract was or could have been entered into as is therein described, or that any such proposition could have been made and accepted by said Board of Trustees, and said allegations in said bill of complaint constitute further evidence of fraud on the part of said complainant and of its intent to try and deceive this Court to grant relief to which it is not entitled in law or in equity.

VII.

These respondents allege that they have not sufficient information, belief or knowledge to enable them to answer any of the allegations contained in paragraph VII of said bill, and
72 therefore and basing their answer on such ground, respondents deny that during any of the times in said paragraph mentioned, complainant maintained or does now maintain a telegraph office in said City of Pomona, or that at any time or that it still is accustomed to receive telegraph messages from the residents of the City of Pomona, or to transmit the same to persons in other places, either in the State of California or in the States of Oregon, Washington, Idaho, or Nevada, or that it received or was accustomed to receive, or had received like messages or any telegraphic messages in any of the aforesaid places, for transmission from or to be transmitted to residents of the City of Pomona, or that it ever transmitted the same or delivered the same to such residents of said City of Pomona either in one continual service over its own line or in any other manner, or at all; or that in so sending or receiving or in so sending and receiving any such messages, the lines of complainant in the City of Pomona now constructed or hereafter to be constructed, are or will be necessary or used in sending or receiving the said or any telegraph messages, or that the same are or will be instrumentalities of interstate commerce, or that in the erection, construction or maintenance of all or any of the said lines, complainant cannot be compelled or required to obtain the permission of the said Board of Trustees of the said City of Pomona so to do, or that complainant is only required in that regard to comply with the reasonable regulations of the said City of Pomona to the height of its wires, condition of its poles
73 or the like, so as not to interfere with the ordinary travel along, upon or in the streets, alleys, and avenues of said city, or that the complainant has heretofore done or that it will continue to do any or all of the said things; and in that behalf all of these answering respondents other than the said City of Pomona, and other than the said Board of Trustees of the City of Pomona, as such, do specially allege and state that they have been and each of them has been a resident and citizen of the said City of Pomona for more than ten years last past, and that as such

residents and citizens of said city, they have been and are familiar with the business of all public institutions and quasi-public institutions doing business in said city, and that they are familar with the business and the ostensible business at all of said times done and now being done by the said complainant in the said City of Pomona, and that they do most respectfully allege and state that never until this controversy arose did they ever hear or understand, or that it was ever claimed that the said complainant was doing any business in the said city other than a purely telephone business, where messages were being transmitted exclusively by means of telephone instruments and articulate speech; and these respondents allege that if the said complainant has ever received or transmitted or delivered any telegraph message whatsoever during any time for more than ten years last past, such act has been rare or connected with its own business from or to its own agents and employees, and that it has not, so far as these respond-
74 ents are aware, ever advertised or publicly offered to receive or transmit any telegraph message, and that in the conduct and in the management of its business in said City of Pomona and elsewhere, the said complainant advertised to do a strictly telephone business and does not advertise to do a telegraph business; on the contrary these respondents allege that the Western Union and the Postal Telegraph & Cable Company have telegraph wires leading through, into and from the said City of Pomona, and that so far as these respondents know, or ever have known, and so far as the public generally knows or ever has known, the entire telegraphic business of the said City of Pomona has been done by the said two telegraph companies for all of the time last past.

Your respondents are further informed and believe, and on such information and belief allege the fact to be, that the said complainant and the said Pacific States Telephone & Telegraph Co., and the said Western Union Telegraph Co., and the said Postal Telegraph & Cable Co. have entered into a compact or agreement or compacts or agreements by which said complainant long prior to the year 1903, agreed and ever since has agreed not to receive, transmit or deliver any message either by telegraph or by telephone except that the senders and receivers of said messages are themselves at their respective phones and themselves send and deliver the said messages, and that the said complainant and its associate company, the said Pacific States Telephone & Telegraph Co. have agreed with the said Western Union Telegraph Co. and the said Postal
75 Telegraph & Cable Co. not to receive or deliver any messages whatsoever, in particular any messages where the same are not sent and transmitted by the articulate speech of the sender thereof.

VIII.

Respondents allege that they have not sufficient information, knowledge or belief to enable them to answer the allegations contained in paragraph VIII of said bill of complaint, and for that reason and basing their answer on such grounds, these respond-

ents deny that the complainant had or now has about 400 telephone subscribers in said city of Pomona, each of whom rents a telephone instrument from the above complainant which is connected with the telephone exchange in said city, or that each of said subscribers has the right or privilege to telephone any telegraph message to be sent from the said city of Pomona by complainant to other offices of complainant in either the States of California, Oregon, Washington, Idaho or Nevada, and on such ground specially deny that the parties renting telephone instruments from complainant have any right or privilege to send any telegraph messages by means or through or with the use of said telephones or through or by or with the agency of said complainant or its telephone exchange, and denies that any such telegraph messages are taken down in the main office of complainant in the said City of Pomona and there transmitted over telegraph lines of complainant, or that telegraph messages from points in any of said States to any such subscriber or subscribers are repeated to
76 them by or through their telephones, or that the same constitutes a continuous service, or that each or all of said telephones of complainant in said city of Pomona have or has at any time been or that they are or will continue instruments for the transmission of Interstate Commerce or for the transmission of telegraphic messages or for the transmission of telephonic communications from residents in said City of Pomona to persons in either of the States of Oregon, Washington, Idaho, or Nevada, by, through or over lines, instrumentalities, or apparatus of complainant at points or places within said States, or that in the course or any course of the transaction of its business complainant is accustomed to receive telegraphic messages sent from points outside of the State of California and within the United States to its subscribers at various places in the State of California including the said City of Pomona, or at its central exchange in said places, or to transmit the contents thereof to its subscribers by telephone in advance by delivering the written copies thereof, or that in many instances no written copies of such telegrams are delivered, subscribers accepting such messages as telephone or that subscribers of complainant in said City of Pomona ever received telegraphic messages in that manner, or that they will continue so to receive them over all or any of the lines of complainant in said city and particularly over any of the lines mentioned in said bill of complaint which are alleged to have been interfered with or destroyed by the officials of said city. In that connection these respondents allege that they are informed and believe and
77 on such information and belief allege that any telegraphic messages sent by, transmitted by or delivered by the said complainant to any person in the said City of Pomona has been in connection with its own business, and that in transmitting and delivering said telegraphic messages it was not doing the same for hire or pay or as a telegraph company, but for its own use, or on its own special business or service.

IX.

Respondents deny that complainant at the time of filing its said bill of complaint or at any time since the year 1898 has been ready or willing to abide by or perform any or all reasonable and proper and valid regulations and restrictions which the said Board of Trustees of the said City of Pomona and their successors may impose or cause to be imposed on complainant in the construction, maintenance and operation of its said poles and lines or upon which its telephone business or telegraph business has been or may be conducted or carried on in said City of Pomona; on the contrary, these respondents again allege and repeat that the said complainant is trying to maintain operate and run a telephone business in said City of Pomona and to occupy the streets, alleys and avenues of said City of Pomoa, with its poles, wires and other appliances without right and without any franchise whatsoever and against law, and these respondents in that connection further allege that the said City of Pomona, through its qualified officials, including its Board of Trustees, from time to time has offered the said complainant that if complainant would apply for a franchise,
78 renewing its privileges, which it formerly had, that it, said city, would offer said franchise for sale, as provided by the laws of the State of California, and that it would at all times give to complainant an opportunity in conformity with the laws of the State of California of obtaining a franchise under and which it might operate, build, maintain and construct a telephone line, and if it so desired, telegraph lines in said city, but said complainant at all times subsequent to the years 1902-3 has maintained its right to violate the law and maintained its right to operate and carry on a telephone business in said city, including the construction, erection and maintenance and operation of telephone poles and telephone lines in, along, over and across the streets, avenues and alleys of said city against the rights of said city and without any franchise whatsoever from said city, and in violation of the laws of the State of California, claiming that because of the use of the word "telegraph" in its articles of incorporation, it is above and beyond the laws of the State of California, and the ordinances and the laws of the said city, and that it could as it saw fit, regardless of the rights of the said city and its citizens, do as it would and as it pleased with its streets, avenues and alleys in the way of maintaining, constructing and operating poles and lines in, along, over and across the same, and said complainant has shown itself unwilling to abide by the laws, and now seeks by this proceeding to obtain rights and privileges contrary to and in violation of the laws of the State of California and of the ordinances of said city.

X.

79 Respondents, S. C. Slanker (wrongly sued herein as S. C. Slemker), and R. G. Loucks, for themselves specially answering the allegations contained in paragraph X of said bill of complaint, in so far as the same specially apply to them, deny that on the first day

of August, 1905, or at any other time, they commenced the destruction of, or thereafter continued the destruction of any telephone lines of complainant in the said City of Pomona connecting the main telephone exchange of said city with any place outside of said city, or that they have already cut down or destroyed any poles or lines in said city, except telephone poles or telephone lines in said city forming a part of the purely local telephone exchange business in said city, and that they have carefully refrained from cutting down or destroying or otherwise injuring any pole, line or wire over which long distance messages are or were being sent to or received by the telephone exchange from the said City of Pomona to or from places outside of said city, or that by any possible construction could be held to be instruments over which interstate messages, either telephonic or telegraphic, could be or had been sent or received; and deny that they have cut down or destroyed or otherwise interfered with any pole or line, appliance or apparatus belonging to the complainant, except such as form a part of what was heretofore its local telephone plant in the City of Pomona, used by it exclusively in connection with its central telephone exchange in its local telephone business over which messages by articulate speech were sent
80 by one subscriber to another, and all of which said poles, wires and appliances were being maintained and were being operated by said complainant, without right, in the City of Pomona, over, across, along and in the public streets, avenues and alleys of said city, and the same were public nuisances to be abated in accordance with the resolutions of the board of trustees of said city, and the same were by these respondents, as officers of said city, cut down and abated as and being public nuisances in the streets of said city, and on the orders and directions of the Board of Trustees of said city.

Deny that any line or pole destroyed, cut down or abated by these respondents on the first day of September, or at any other time, or which they intended to destroy and abate was or ever had been or would become an instrument used or to be used in the transaction of interstate commerce or interstate business. Deny that any act or threatened act on the part of any of the respondents answering by this answer will cause complainant great or irreparable injury or damage, and deny that any act committed or threatened to be committed by any of these respondents will interfere with the proper carrying on of any business of complainant with the Government of the United States and the several or any departments thereof, their officers or agents, and deny that the Government of the United States, or any of its departments, officers or agents, or the general public will be put to great or any inconvenience or loss through being deprived of the use of the telephone or telegraph system in
81 the City of Pomona heretofore maintained, constructed and operated by complainant, and deny that the Government of the United States, or any of the departments thereof, their officers or agents or the general public will ever know that complainant is deprived or will be deprived of its power of sending telegraphic messages, particularly for the reason that the said Government, or the said departments thereof, never have, and in all probability never

will apply to said complainant that it, said complainant, transmit any telegraphic messages over any of its said lines. And said respondents, Slanker and Loucks, still specially answering the allegations contained in said paragraph X of said bill of complaint, deny that any damage or injury has accrued or will accrue or result to complainant or to its business through its inability to properly handle telegraphic messages within or going to or coming from said City of Pomona. And admit that the amount of any such loss and detriment will not be susceptible of pecuniary estimation and determination solely and wholly for the reason and because that no figures or standard of measurement could be found or is now known which are or is small enough to measure or estimate any such possible pecuniary loss to which the complainant might be put by any interference with its telegraphic business in said City of Pomona, or any business in connection with the transmission of long distance messages by telegraph from said City of Pomona to outside places.

82

XI.

Respondents allege that they have not sufficient knowledge, information or belief to enable them to answer any of the allegations contained in that part of paragraph X of said bill of complaint commencing with line 13, page 17 of said bill of complaint, and ending with line 20, page 18 of said bill, and therefore, and basing their answer on such ground, respondents deny that prior to said first day of September, 1905, or at any other time, complainant had received or was accustomed to receive telegraph messages or telephone communications from persons outside of the State of California which were sent, or directed or delivered to the telephone subscribers of complainant in said City of Pomona over its lines in said city in the manner described in said bill of complaint, or in any manner, or that during said time, complainant transmitted telegraphic messages or telephone communications which were received by it from its subscribers in said City of Pomona or delivered the same to parties outside of the State of California within the United States, or that all or any of the said messages or communications were delivered or transmitted wholly over the telephone or telegraph lines of complainant or over lines of complainant which were connected with other lines of complainant in the States of Oregon, Washington, Idaho or Nevada, or that all or any of such messages or communications were entirely transmitted or delivered through, upon or over the said lines of complainant, or that any interference

83 with or destruction of the property of complainant by respondents Slanker and Loucks is in violation of or repugnant to the rights or privileges of the complainant under or pursuant to the constitution or laws of the United States, or of any subdivision or provision of said constitution or of any Act of Congress, and particularly of the Act of Congress approved July 24, 1866, referred to in said bill of complaint, or that by reason of said or any interference or destruction by respondents Slanker and Loucks, or either, complainant has been deprived of any right or privilege to construct,

maintain or operate lines of telegraph or telephone along, over and across the public streets, avenues, alleys or highways of the said City of Pomona to complainant's great or irreparable damage or loss, or at all. And respondents Slanker and Loucks deny that they are financially irresponsible and unable to respond in damages to complainant for any injuries which they have or may have inflicted or which they may threaten to inflict upon the property of complainant.

XII.

These respondents deny that this cause of action is a suit arising under the Constitution of the United States, or under any provision thereof, and particularly under subdivision I, Section 10, Article I of said Constitution, or under Section I of Article XIV of the Amendments of said Constitution, or that this case is a suit or cause arising under the laws of the United States, particularly under the said act of Congress approved July 24, 1866, or the several amendments thereof. Deny that complainant has not a plain, speedy and adequate remedy at law in the premises.

84 XIII.

These answering respondents specially allege that in the month of August, 1888, the above-named complainant applied to the Board of Trustees of the said City of Pomona for a franchise in accordance with the laws of the State of California, granting to said complainant the privilege of constructing, erecting, maintaining and operating a telephone system in said City of Pomona over, along and across the public streets, avenues and alleys of said city. That thereupon the Board of Trustees of the said city, acting upon said application on the 8th day of August, 1888, regularly passed and adopted an ordinance of said city, being Ordinance No. 30 of the ordinances and laws of said city, wherein and whereby the said City of Pomona, by its said Board of Trustees, so acting, granted and gave to said complainant a franchise to build, construct, operate and maintain a public telephone system in the said city in accordance with the terms and provisions of said ordinance and as provided for therein over, across and along the public streets, avenues and alleys of said city, a copy of which said ordinance is hereto annexed, marked "Exhibit A" and is hereby made a part of this answer, the same as though fully copied into this paragraph.

That said complainant, under said franchise so granted to it and not otherwise, and not under any other claim or right whatsoever, went upon the public streets of said city and took possession of such parts thereof as were necessary or convenient to the erection, construction, operation, and maintenance of its said telephone system,

85 including poles, lines, cross-arms and other parts and appliances forming a part and parts thereof, and under said privileges and franchise so granted to it, continued in such possession of the said parts of said streets. That said franchise, as recited in said ordinance, was for the term of ten (10) years from and after the date of approval thereof, viz: ten years from and after the 8th day of

August, 1888, and the same expired by its terms and by operation of law on the 8th day of August, 1898. That said franchise has never been renewed or extended or in any manner enlarged or changed, but the same at all times was the only warrant or authority in law, in equity or in fact, to or for the said complainant erecting, constructing, maintaining, or operating any lines, poles, cross-bars, cross-beams, wires or other appliances or apparati in, on or over any of the streets, avenues or alleys of said city, in connection with its said telephone business, and as hereinafter alleged, ever since the expiration of said franchise, the said City of Pomona, by its various officers, and particularly by and through its City Attorney and its Board of Trustees, has tried to induce the said complainant to apply for a renewal of said franchise, or for a new franchise, in order that it might not be in the position of maintaining a public nuisance in the streets of the said city, and in order that the avenues occupied and in the possession of a quasi-public corporation having no right to occupy, use or possess the same, particularly for the purposes and in the manner for and in which the same
86 ever since the said month of August, 1898, have been possessed, occupied and used by the said complainant; but the said complainant, showing its contempt for the said City of Pomona and for its authority and for its rights and the rights of its citizens and inhabitants, has declined to ask for any further franchise or permission, but ever since the said 8th day of August, 1898, the said complainant has maintained, constructed and operated the said telephone system in said city, over, along, across and in the streets, avenues and alleys thereof, in contempt of the authority of said city and in contempt of its ordinances and of its laws, and in contempt of the laws and statutes of the state of California, and in contempt of the rights of said city and of the inhabitants and residents thereof, to the great annoyance of the said city and of the inhabitants thereof, and that the said complainant is now maintaining, constructing and operating along, over and across, in and through the streets, alleys and avenues of said city a large telephone system, consisting of numerous poles of many inches in diameter and several feet in height and of enormous metallic wire lines running from pole to pole and of cross-bars and of other instruments and appliances, each and all of which obstruct free untrammeled use of the said streets, and the same are and at the time of the filing of the bill of complaint herein were parts of one general telephone system, and together form and create a pubiic nuisance and each part thereof in itself was and is a public nuisance in the streets of the said city.

XIV.

87 And your respondents further answering the said bill of complaint, and as a further ground and reason why this Court, sitting as a court of equity of the United States, should not grant unto complainant any equitable relief whatsoever, do respectfully set forth that they are informed and believe and on such in-

formation and belief allege the facts to be that said complainant is now and at all the times since the filing of its bill of complaint was violating the laws of the United States and the laws of the State of California governing and controlling public corporations, and particularly corporations organized for the purpose of carrying on a public telephone or telegraph business, particularly in that said complainant has associated itself intimately with another corporation organized under the laws of the State of Oregon, known as the Pacific States Telephone and Telegraph Company, with the idea and for the purpose of having said Pacific States Telephone and Telegraph Company to secretly arrange and agree to carry and deliver all long distance messages between cities, and have entered into other compacts and agreements by which they agree mutually, one with the other, not to compete or erect competing lines, but to maintain extravagant prices and charges for telephone business; that the officers of said Pacific States Telephone and Telegraph Company are, and always have been practically the same as the officers of the said complainant, and that this complainant is but a corporate instrument in the hands of said Pacific States Telephone and Telegraph
88 Company for the purpose of enabling the said Pacific States Telephone and Telegraph Company to evade the laws of the United States and of the State of California and the ordinances of the various cities of the said State, and that all or practically all of the stock of the said complainant is owned by the said Pacific States Telephone and Telegraph Company, and that said Pacific States Telephone and Telegraph Company, in fact, is the owner of the telephone and telegraph lines connecting the said City of Pomona with outside places and particularly with places outside of the State of California; that certain of the local telephone lines, particularly the lines within certain cities of the State of California, and particularly the local telephone lines of the said City of Pomona, are allowed to be owned by, operated by and put in the name of the above-named complainant, in order to avoid certain of the laws of the United States and of the State of California and of certain ordinances of the several cities of the said State.

Wherefore, these respondents pray the judgment of your Honors and of the above-entitled court in their favor and in the favor of each of them and against the above-named complainant:

1. That the said complainant take nothing whatsoever by its bill of complaint or by this action, and that it be denied relief, and be denied its costs, and that it be adjudged and decreed that said complainant has come into this court asking equitable relief at the hands of this court against law and contrary to equity and the rules and practices of the courts of equity of the United States.

89 2. That it be adjudged and decreed that the said complainant has not now and that at the time of the filing of its bill of complaint it had not, and that at no time since the 8th day of August, 1898, has it had the right to maintain, construct, erect, build and operate any telephone or telegraph lines or system along, over, in or across any of the streets, alleys or avenues of said city, and at none of the said times it had the right to erect, con-

struct or operate any telephone or telegraph lines or poles or any parts or appliances forming any part of the telephone system or telegraph system or telephone and telegraph system in, over, along or across any of the said streets, alleys or avenues of said city.

3. That the said complainant be ordered at once and within a time to be fixed by this Honorable Court, to remove from each and all of the streets, alleys and avenues of said City of Pomona, each and all of its poles, wires, cross-bars, lines and other parts and appliances now located and being operated and maintained by said complainant in, on and over said streets, alleys and avenues, and that unless within said time said complainant does so remove the same, that the same be abated in the manner provided by law and rules and practices of this court, and that the same then, at the expense and cost of the said complainant, be removed and destroyed by the proper officers of this court for that purpose by it directed.

4. That it be adjudged and decreed that said complainant has no right whatsoever to erect, build, construct, maintain or operate either a telephone or telegraph or telephone and telegraph system consisting of wires, poles, cross-bars or other appliances in, over, on or across any street, alley or avenue of the said City of Pomona.

5. That these respondents and each of them do have such other, further and general relief at the hands of this court as to it may seem meet, equitable and proper in the premises, and for their costs.

And these respondents will thus ever pray.

CITY OF POMONA,
By MEL CAMPBELL,
President of the Board of Trustees of the City of Pomona.
[SEAL]
MEL CAMPBELL,
L. R. MATTHEWS,
N. W. MILLER,
JOSEPH DOUGLASS,
J. F. ULERY,
Members of and Constituting said Board of Trustees.
S. C. SLANKER,
Superintendent of Streets of said City of Pomona.
S. C. SLANKER.
ROBERT G. LOUCKS,
City Attorney of said City of Pomona.
ROBERT G. LOUCKS.

Attest:

A. N. HARRIS,
City Clerk.
By T. R. TROTTER, *Deputy.*

ROBERT G. LOUCKS,
Solicitor for all the Above Answering Respondents, and City Attorney of said City of Pomona.

91 STATE OF CALIFORNIA,
County of Los Angeles, ss:

S. C. Slanker, being by me first duly sworn, deposes and says that he is one of the respondents in the above-entitled action, answering by the foregoing answer; that he has heard read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated or denied upon information or belief, and as to those matters that he believes it to be true.

S. C. SLANKER.

Subscribed and sworn to before me this 4th day of November, 1905.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT "A" [TO ANSWER].

Ordinance No. 30.

An Ordinance of the City of Pomona Granting to the Sunset Telephone-Telegraph Company (a Corporation) the Right to Erect Poles and Telephone Wires Along the Public Streets of Said City for a Period of Ten Years.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. The Sunset Telephone-Telegraph Company is hereby granted, for the period of ten years from date of passage and
92 approval of this ordinance, the right, and are hereby authorized, to erect and maintain telephone poles and to run wires thereon oved and along the public streets and thoroughfares of said city, subject to the provisions, limitations and restrictions, and on the conditions hereinafter contained.

SEC. 2. Poles to be erected for the purpose mentioned in the preceding section shall be placed from one hundred and fifty to one hundred and eighty feet apart, but shall not be so placed as to in any manner obstruct or interfere with the free use of any street, alley, or driveway in said city. The outer face of all poles shall be placed within and adjoining the curb.

SEC. 3. Telephone wires shall in all cases be suspended at a distance of at least nineteen feet from the ground, and maintained at that or a greater altitude at all points where wires are placed.

SEC. 4. In case it shall at any time become necessary, in order to extinguish or prevent fire, or to protect property against loss or injury by fire in said city, to remove any of the poles or wires mentioned in the foregoing sections of this ordinance, the same may be removed by or under the direction of the fire department of said city, and such poles and wires shall be replaced and repaired by

said corporation in its discretion, but at its own expense, and no charge shall ever be made against, nor claim allowed or paid by said city for any injury to such poles or wires necessarily caused by said fire department, as aforesaid.

93 SEC. 5. This ordinance is passed and the franchise hereby provided for is granted on the further condition that said city, whenever, in the discretion of its Board of Trustees, it shall elect so to do, shall have the right to use such telephone poles for the purpose of suspending thereon or attaching thereto fire-alarm wires, at such reasonable, convenient, and practicable point or place of such poles as may be designated by the grantees, provided that such fire-alarm wires shall be placed in position by or under the direction or supervision of said Telephone-Telegraph Company.

SEC. 6. No private residence, building, or structure in said city shall be used by said Telephone-Telegraph Company for the purpose of suspending or supporting any of its telephone wires in said city without permission of the owner of such residence, building, or structure.

SEC. 7. This ordinance shall take effect and be in force from and after the date of its publication.

Approved this eighth day of August, 1888.

CHARLES FRENCH,
President of the Board of Trustees.

Attest:

ARZA CRABB,
City Clerk.

Received copy of the within answer this 6th day of November, 1905.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
Solicitors for Complainant.

94 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Answer. Filed Nov. 6, 1905. Wm. M. Van Dyke, Clerk. Robert G. Loucks, Solicitor for Respondent. Rooms 2 & 3, Union Block, West Second St., Pomona, California.

[*Exceptions to Answer for Impertinence.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) et al., Respondents.

Exceptions for Impertinence Taken by the Complainant to the Answer of the Respondents, City of Pomona and the Board of Trustees of Said City of Pomona, Mel Campbell, N. W. Meller, L. R. Matthews, Joseph Douglass and J. F. Ulery, as Members of and Constituting the Board of Trustees of the Said City of Pomona, S. C. Slaker, as the Superintendent of the Streets in and for the Said City of Pomona; R. G. Loucks, as City Attorney of Said City of Pomona, and S. C. Slanker and R. G. Loucks.

95 Now comes the complainant in the above-entitled cause and takes the following exceptions for impertinence to the answer of the above-named respondents to the bill in equity filed in this cause by the complainant therein, and describes the following as the particular passages in the said answer hereby objected to as containing impertinent matter:

First Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the words "that if under," on line 16 of page 5 thereof, and ending with the words "could not have," on line 25 of page 5 thereof;

Second Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning wit hthe words "and that the said complainant," on line 25 of page 5 thereof, and ending with the words "or any messages whatsoever," on line 2 of page 6 thereof;

Third Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the words "and that said," on line 2 of page 6 thereof, and ending with the words "provided by said Act," on line 11 of page 6 thereof;

Fourth Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the words "and these respondents," on line 11 of page 6 thereof, and ending with the word "business," on line 17 of page 6 thereof;

Fifth Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the
96 words "And in," on line 24 of page 6 thereof, and ending with the words "other place," on line 6 of page 7 thereof;

Sixth Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the word "but,"

on line 6 of page 7 thereof, and ending with the word "elsewhere," on line 28 of page 7 thereof;

Seventh Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the words "and these," on line 29 of page 7 thereof, and ending with the word "hands," on line 4 of page 8 thereof;

Eighth Exception: For that the following part of paragraph II of said answer is impertinent, to wit: Beginning with the words "but has come," on line 4 of page 8 thereof, and ending with the words "to do and perform," on line 11 of page 8 thereof;

Ninth Exception: For that the following part of paragraph III of said answer is impertinent, to wit: Beginning wit hthe words "that the said poles," on line 24 of page 9 thereof, and ending with the word "therein," on line 31 of page 9 thereof;

Tenth Exception: For that the following part of paragraph III of said answer is impertinent, to wit: Beginning with the words "and that said facts," on line 16 of page 10 thereof, and ending with the words "which are untrue," on line 21 of page 10 thereof;

Eleventh Exception: For that the following part of paragraph III of said answer is impertinent, to wit: Beginning with the words "the said allegations," on line 5 of page 12 thereof, and end-
97 ing with the word "complainant," on line 12 of page 12 thereof;

Twelfth Exception: For that the following part of paragraph III of said answer is impertinent, to wit: Beginning with the words "said allegations are," on line 14 of page 12 thereof, and ending with the words "capacity as such," on line 24 of page 12 thereof;

Thirteenth Exception: For that the following part of paragraph IV of said answer is impertinent, to wit: Beginning with the word "whereupon," on line 28 of page 13 thereof, and ending with the words "in said City," on line 2 of page 14 thereof;

Fourteenth Exception: For that the following part of paragraph IV of said answer is impertinent, to wit: Beginning with the words "and on August," on line 2 of page 14 thereof, and ending with the word "Pomona," on line 6 of page 14 thereof;

Fifteenth Exception: For that the following part of paragraph IV of said answer is impertinent, to wit: Beginning with the words "That on said," on line 7 of page 14 thereof, and ending with the word "inhabitants," on line 11 of page 14 thereof;

Sixteenth Exception: For that the following part of paragraph V of said answer is impertinent, to wit: Beginning with the words "that the use," on line 16 of page 15 thereof, and ending with the word "California," on line 26 of page 15 thereof;

Seventeenth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the words "that said long," on line 1 of page 17 thereof, and ending
98 with the word "complainant," on line 6 of page 17 thereof;

Eighteenth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the

words "and that each," on line 7 of page 17 thereof, and ending with the words "rented the same," on line 18 of page 17 thereof;

Nineteenth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the words "that ever since," on line 14 of page 19 thereof, and ending with the word "alleys," on line 23 of page 19 thereof;

Twentieth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the words "that by means," on line 23 of page 19 thereof, and ending with the word "Pomona," on line 28 of page 19 thereof;

Twenty-first Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the words "which public," on line 28 of page 19 thereof, and ending with the word "alleys," on line 9 of page 20 thereof;

Twenty-second Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the word "in," on line 3 of page 22 thereof, and ending with the word "street," on line 7 of page 22 thereof;

Twenty-third Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the words "the said paved," on line 30 of page 22 thereof, and ending with the word "City," on line 15 of page 23 thereof;

99 Twenty-fourth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the word "as," on line 11 of page 24 thereof, and ending with the words "well know," on line 13 of page 24 thereof;

Twenty-fifth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the word "neither," on line 13 of page 24 thereof, and ending with the word "six," on line 20 of page 24 thereof;

Twenty-sixth Exception: For that the following part of paragraph VI of said answer is impertinent, to wit: Beginning with the words "that such complainant," on line 21 of page 24 thereof, and ending with the word "equity," on line 31 of page 24 thereof;

Twenty-seventh Exception: For that the following part of paragraph VII of said answer is impertinent, to wit: Beginning with the words "they have been," on line 15 of page 26 thereof, and ending with the word "speech," on line 2 of page 26½ thereof;

Twenty-eighth Exception: For that the following part of paragraph VII of said answer is impertinent, to wit: Beginning with the words "if the said," on line 2 of page 26½ thereof, and ending with the words "and employees," on line 7 of page 26½ thereof;

Twenty-ninth Exception: For that the following part of paragraph VII of said answer is impertinent, to wit: Beginning with the words "it has not," on line 7 of page 26½ thereof, and ending with

100 the word "message," on line 9 of page 26½ thereof;

Thirtieth Exception: For that the following part of paragraph VII of said answer is impertinent, to wit: Beginning with the words " in the conduct," on line 10 of page 26½ thereof, and ending with the word "business," on line 13 of page 26½ thereof;

Thirty-first Exception: For that the following part of paragraph

VII of said answer is impertinent, to wit: Beginning with the word "on," on line 13 of page 26½ thereof, and ending with the words "last past," on line 22 of page 26½ thereof;

Thirty-second Exception: For that the following part of paragraph VII of said answer is impertinent, to wit: Beginning with the words "that the said," on line 3 of page 27 thereof, and ending with the word "thereof," on line 19 of page 27 thereof;

Thirty-third Exception: For that the following part of paragraph IX of said answer is impertinent, to wit: Beginning with the word "claiming," on line 2 of page 31 thereof, and ending with the word "City," on line 14 of page 31 thereof;

Thirty-fourth Exception: For that the following part of paragraph X of said answer is impertinent, to wit: Beginning with the words "and the same," on line 19 of page 32 thereof, and ending with the words "said City," on line 21 of page 32 thereof;

Thirty-fifth Exception: For that the following part of paragraph X of said answer is impertinent, to wit: Beginning with the
101 words "and the same," on line 21 of page 32 thereof, and ending with the word "City," on line 24 of page 32 thereof;

Thirty-sixth Exception: For that the following part of paragraph X of said answer is impertinent, to wit: Beginning with the word "particularly," on line 18 of page 33 thereof, and ending with the words "its said lines," on line 22 of page 33 thereof;

Thirty-seventh Exception: For that the following part of paragraph X of said answer is impertinent, to wit: Beginning with the words "and admit," on line 28 of page 33 thereof, and ending with the word "places," on line 8 of page 34 thereof;

Thirty-eighth Exception: For that the following part of paragraph XIII of said answer is impertinent, to wit: Beginning with the word "and," on line 25 of page 37 thereof, and ending with the word "franchise," on line 1 of page 38 thereof;

Thirty-ninth Exception: For that the following part of paragraph XIII of said answer is impertinent, to wit: Beginning with the words "in order that," on line 1 of page 38 thereof, and ending with the word "City," on line 3 of page 38 thereof;

Fortieth Exception: For that the following part of paragraph XIII of said answer is impertinent, to wit: Beginning with the words "and in order," line 3 of page 38 thereof, and ending with the word "complainant," on line 10 of page 38 thereof;

Forty-first Exception: For that the following part of paragraph XIII of said answer is impertinent, to wit: Beginning with the word "showing," on line 10 of page 38 thereof, and ending
102 with the words "and inhabitants," on lines 12 and 13 of page 38 thereof;

Forty-second Exception: For that the following part of paragraph XIII of said answer is impertinent, to wit: Beginning with the words "has declined," on line 13 of page 38 thereof, and ending with the words "or permission," on line 14 of page 38 thereof;

Forty-third Exception: For that the following part of paragraph XIII of said answer is impertinent, to wit: Beginning with the words

"in contempt of," on line 18 of page 38 thereof, and ending with the words "residents thereof," on line 22 of page 38 thereof;

Forty-fourth Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the words "said complainant," on line 14 of page 39 thereof, and ending with the word "business," on line 20 of page 39 thereof;

Forty-fifth Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the word "particularly," on line 20 of page 39 thereof, and ending with the word "Company," on line 23 of page 39 thereof;

Forty-sixth Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the word "with," on line 23 of page 39 thereof, and ending with the word "business," on line 2 of page 40 thereof;

103 Forty-seventh Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the words "that the officers," on line 2 of page 40 thereof, and ending with the word "complainant," on line 4 of page 40 thereof;

Forty-eighth Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the word "and," on line 4 of page 40 thereof, and ending with the word "State," on line 10 of page 40 thereof;

Forty-ninth Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the words "and that," on line 10 of page 40 thereof, and endng with the word "Company," on line 13 of page 40 thereof;

Fiftieth Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the words "and that," on line 1 of page 40 thereof, and ending with the word "California," on line 17 of page 40 thereof;

Fifty-first Exception: For that the following part of paragraph XIV of said answer is impertinent, to wit: Beginning with the words "that certain," on line 17 of page 40 thereof, and ending with the word "State," on line 24 of page 40 thereof:

104 In which particulars this exceptant excepts to the said answer as impertinent and prays that the said impertinent matter be expunged therefrom.

Dated San Francisco, November 28, 1905.

PILLSBURY, MADISON & SUTRO,
Solicitors for Complainant.

BICKNELL, GIBSON, TRASK,
DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Of Counsel.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona. Exceptions to Answer for Impertinence. Filed Dec. 4, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol's for Complainant, Union Trust Building, San Francisco.

[*Exceptions to Answer for Scandal.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) et al., Respondents.

105 Exceptions for scandal taken by the complainant to the answer of the respondents, City of Pomona and the Board of Trustees of said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglass and J. F. Ulrey, as members of and constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as Superintendent of the Streets in and for the said City of Pomona; R. G. Loucks, as City Attorney of said City of Pomona, and S. C. Slanker and R. G. Loucks.

Now comes the complainant in the above-entitled cause and takes the following exceptions for scandal to the answer of the above-named respondents to the bill in equity filed in this cause by the complainant therein, and describes the following as the particular passages in the said answer hereby objected to as containing scandalous matter:

First Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the words "that if under," on line 16 of page 5 thereof, and ending with the words "could not have," on line 25 of page 5 thereof;

Second Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the words "and that the said complainant," on line 25 of page 5 thereof, and ending with the words "or any messages whatsoever," on line 2 of page 6 thereof;

Third Exception. For that following part of paragraph II
106 of said answer is scandalous, to wit: Beginning with the words "and that said," on line 2 of page 6 thereof, and ending with the words "provided by said Act," on line 11 of page 6 thereof;

Fourth Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the words "and these respondents," on line 11 of page 6 thereof, and ending with the word "business," on line 17 of page 6 thereof;

Fifth Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the words "And in," on line 24 of page 6 thereof, and ending with the words "other place," on line 6 of page 7 thereof;

Sixth Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the word "but,"

on line 6 of page 7 thereof, and ending with the word "elsewhere," on line 28 of page 7 thereof;

Seventh Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the words "and these," on line 29 of page 7 thereof, and ending with the word "hands," on line 4 of page 8 thereof;

Eighth Exception. For that the following part of paragraph II of said answer is scandalous, to wit: Beginning with the words "but has come," on line 4 of page 8 thereof, and ending with the words "to do and perform," on line 11 of page 8 thereof;

Ninth Exception. For that the following part of paragraph III of said answer is scandalous, to wit: Beginning with the
107 words "and that said facts," on line 16 of page 10 thereof, and ending with the words "which are untrue," on line 21 of page 10 thereof;

Tenth Exception. For that the following part of paragraph III of said answer is scandalous, to wit: Beginning with the words "the said allegations," on line 5 of page 12 thereof, and ending with the word "complainant," on line 12 of page 12 thereof;

Eleventh Exception. For that the following part of paragraph III of said answer is scandalous, to wit: Beginning with the words "said allegations are," of line 14 of page 12 thereof, and ending with the words "capacity as such," on line 24 of page 12 thereof;

Twelfth Exception. For that the following part of paragraph IV of said answer is scandalous, to wit: Beginning with the words "That on said," on line 7 of page 14 thereof, and ending with the word inhabitants," on line 11 of page 14 thereof;

Thirteenth Exception. For that the following part of paragraph V of said answer is scandalous, to wit: Beginning with the words "that the use," on line 16 of page 15 thereof, and ending with the word "California," on line 26 of page 15 thereof;

Fourteenth Exception. For that the following part of paragraph VI of said answer is scandalous, to wit: Beginning with the word "as," on line 11 of page 24 thereof, and ending with the words "well know," on line 13 of page 24 thereof;

Fifteenth Exception. For that the following part of paragraph VI of said answer is scandalous, to wit: Beginning with the
108 words "that said complainant," on line 21 of page 24 thereof, and ending with the word "equity," on line 31 of page 24 thereof;

Sixteenth Exception. For that the following part of paragraph VII of said answer is scandalous, to wit: Beginning with the words "that the said," on line 3 of page 27 thereof, and ending with the word "thereof," on line 19 of page 27 thereof;

Seventeenth Exception For that the following part of paragraph IX of said answer is scandalous, to wit: Beginning with the word "claiming," on line 2 of page 31 thereof, and ending with the word "City," on line 14 of page 31 thereof;

Eighteenth Exception. For that the following part of paragraph X of said answer is scandalous, to wit: Beginning with the words

"and admit," on line 28 of page 33 thereof, and ending with the word "places," on line 8 of page 34 thereof;

Nineteenth Exception. For that the following part of paragraph XIII of said answer is scandalous, to wit: Beginning with the word "showing," on line 10 of page 38 thereof, and ending with the words "and inhabitants," on lines 12 and 13 of page 38 thereof;

Twentieth Exception. For that the following part of paragraph XIII of said answer is scandalous, to wit: Beginning with the words "in contempt of," on line 18 of page 38 thereof, and ending with the words "residents thereof," on line 22 of page 38 thereof;

Twenty-first Exception. For that the following part of
109 paragraph XIV of said answer is scandalous, to wit: Beginning with the words "said complainant," on line 14 of page 39 thereof, and ending with the word "business," on line 20 of page 39 thereof;

Twenty-second Exception. For that the following part of paragraph XIV of said answer is scandalous, to wit: Beginning with the word "particularly," on line 20 of page 39 thereof, and ending with the word "Company," on line 23 of page 39 thereof;

Twenty-third Exception. For that the following part of paragraph XIV of said answer is scandalous, to wit: Beginning with the word "with," on line 23 of page 39 thereof, and ending with the word "business," on line 2 of page 40 thereof;

Twenty-fourth Exception. For that the following part of paragraph XIV of said answer is scandalous, to wit: Beginning with the words "that the officers," on line 2 of page 40 thereof, and ending with the word "complainant," on line 4 of page 40 thereof;

Twenty-fifth Exception. For that the following part of paragraph XIV of said answer is scandalous, to wit: Beginning with the word "and," on line 4 of page 40 thereof, and ending with the word "State," on line 10 of page 40 thereof;

Twenty-sixth Exception. For that the following part of paragraph XIV of said answer is scandalous, to wit: Beginning with the words "and that," on line 10 of page 40 thereof, and ending with the word "Company," on line 13 of page 40 thereof;

110 Twenty-seventh Exception. For that the following part of paragraph XIV of said answer is scandalous, to wit: Beginning with the words "that certain," on line 17 of page 40 thereof, and ending with the word "State," on line 24 of page 40 thereof;

In which particulars this exceptant excepts to the said answer as scandalous and prays that the said scandalous matter be expunged therefrom.

Dated San Francisco, November 28, 1905.

PILLSBURY, MADISON & SUTRO,
Solicitors for Complainant.
BICKNELL, GIBSON, TRASK,
DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Of *Counsel.*

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona. Exceptions to Answer for Scandal. Filed Dec. 4, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sols. for Complainant, Union Trust Building, San Francisco.

111 [*Exceptions to Answer for Insufficiency.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) et al., Respondents.

Exceptions for insufficiency taken by the complainant to the answer of the respondents, City of Pomona and the Board of Trustees of said City of Pomona, Mel Campbell, N. W. Miller, L. R. Matthews, Joseph Douglass and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of the Streets in and for the said City of Pomona; R. G. Loucks, as City Attorney of said City of Pomona, and S. C. Slanker and R. G. Loucks.

Now comes the complainant in the above-entitled cause and takes the following exceptions for insufficiency to the answer of the above-named respondents to the bill in equity filed in this cause by the complainant therein, and describes the following as the
112 particular passages in the said answer hereby objected to as insufficient:

First Exception. For that in the said bill in equity it is alleged, in paragraph I thereof, beginning on line 16 of page 2 thereof, and ending on line 22 of page 22 thereof, as follows:

"That your orator is and at all the times hereinafter mentioned was, and for more than ten years last past has been, a corporation organized and existing under and by virtue of the laws of the State of California as a telephone and telegraph company, and was at all said times and is authorized and empowered by its articles of incorporation to do a general telephone and telegraph business";

and for that the said allegations of the said bill are denied in the said answer, in paragraph I thereof, beginning with line 11 of page 2 thereof, and ending with line 21 of page 2 thereof, as follows:

"but these respondents allege that they have not sufficient information, knowledge or belief to enable them to answer any of the allegations contained in paragraph I of said bill of complaint which are

hereinafter denied, and therefore, and basing their answer on such ground, deny said allegations, and so denying, do deny that said complainant is a telephone or telegraph company, or a telephone and telegraphic company, or that it was at all or at any time au-
113 thorized or empowered by its Articles of Incorporation to do a general telephone and telegraph or a general telephone or telegraph business";

Second Exception: For that in the said bill in equity it is alleged, in paragraph II thereof, beginning on line 20 of page 4 thereof, and ending on line 3 of page 5 thereof, as follows:

"That on the 4th day of December, 1897, your orator accepted in writing, without reservation, all of the restrictions and obligations of the Act of Congress, approved July 24, 1866, entitled, 'An Act to aid in the construction of Telegraph lines and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes.' That thereafter, and on the 14th day of December, 1897, your orator filed said written consent with the Postmaster-General, as and in the manner by said Act provided, and that thereupon and on said 14th day of December, 1897, the said Postmaster-General certified in writing that said acceptance was on said 14th day of December, filed in the office of said Postmaster-General";

and for that the said allegations of the said bill are denied in the said answer, in paragraph II thereof, beginning with line 16 of page 4 thereof, and ending with line 6 of page 5 thereof, as follows:

"Allege that these respondents have not, nor has either of them, sufficient information, knowledge or belief to enable them to answer any of the allegations contained in paragraph II of said bill of complaint, and therefore, and basing their answer on such ground and for said reasons, these respondents deny each and every allegation in said paragraph contained, and deny that on the 4th day of December, 1897, or at any other time, complainant in writing or
114 otherwise, without reservation or at all, accepted, the restrictions or obligations of the Act of Congress approved July 24, 1866, entitled: 'An Act to aid in the construction of Telegraph Lines and to Secure to the Government the use of the Same for Postal, Military or Other Purposes,' or that thereafter, on the 14th day of December, 1897, or at any other time, complainant filed said written consent with the Postmaster-General in any manner or at all, or as provided by said act, or that said Postmaster-General certified in writing that said acceptance was on said 14th day of December, 1897, or on any other day filed in the office of said Postmaster-General";

Third Exception: For that in the said bill in equity it is alleged, in paragraph III thereof, beginning on line 25 of page 5 thereof, and ending on line 2, page 6 thereof, as follows:

"That the said roads, streets, alleys, and highways in, over and along which said lines have been so constructed, in the said City of Pomona, were and now are kept up and maintained as public roads and highways and were and are public roads and highways, of the

State of California, and were and now are also open post-roads of the United States";

and for that the said allegations of the said bill are denied in the said answer, in paragraph III thereof, beginning on line 12 of page 9 thereof, and ending on line 17 of page 9 thereof, as follows:

115 "Respondents deny that the streets, roads, alleys or highways of the said City of Pomona at any time were or are now being used as open postroads of the United States, except as streets, alleys and highways are used by the postoffice employés of the United States in common with other people and the general traveling public";

Fourth Exception: For that in the said bill in equity it is alleged, in paragraph III thereof, beginning on line 3 of page 7 thereof, and ending on line 11 of page 7 thereof, as follows:

"That annexed to said schedule and issued by said Postmaster-General is a list entitled; 'Telegraph Companies which have accepted the conditions of the Act of July 24th, 1866, and which are subject to the provisions of the Order of the Postmaster-General fixing government Rates'; that the name of your orator appears in said list as follows: '125. The Sunset Telephone and Telegraph Company. John I. Sabin, President, San Francisco, Cal. Received and Filed December 14, 1897";

and for that the said allegations of the said bill are denied in the said answer, in paragraph III thereof, beginning on line 22 of page 10 thereof, and ending on line 25 of page 11 thereof, as follows:

"These respondents allege that they have not, nor has either of them, sufficient knowledge, information or belief to enable them to answer any of the allegations contained in that part of paragraph III of said bill of complaint commencing with the beginning of line 25, page 5, of the said bill, and ending with line 24,

116 page 6, of said bill, and therefore, and basing their answer on such grounds and for such reasons, these respondents deny ——— that annexed to said schedule issued by said Postmaster-General, is a list entitled: 'Telegraph Companies which have accepted the conditions of the Act of July 24, 1866, and which are subject to the Provisions of the Order of the Postmaster-General fixing Government rates,' or that the name of complainant appears in said list as set forth in said bill of complaint as follows: '125. The Sunset Telephone and Telegraph Company. John I. Sabin, President, San Francisco, Cal. Received and Filed December 14, 1897";

In all of which particulars the said complainant excepts to the answer of the said respondents as evasive, imperfect and insufficient, and prays that the said respondents may be compelled to put in full and sufficient answer.

Dated San Francisco, November 28, 1905.

PILLSBURY, MADISON & SUTRO,
Solicitors for Complainant.
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Of Counsel.

[Endorsed]: No. 1209 U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona. Exceptions to Answer for Insufficiency. Filed Dec. 4, 1905. Wm. M. Van Dyke, Clerk.
117 Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sols. for Complainant, Union Trust Building, San Francisco.

[*Report of Special Master on Exceptions to Answer for Impertinence and Scandal.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) et al., Respondents.

To the Honorable Judges of the Circuit Court of the United States, Southern District of California, Southern Division, in Chancery Sitting:

In pursuance of an order of this Honorable Court made in the above-entitled case, and dated the 4th day of December, 1905, by which was referred the several exceptions taken by the complainant to the answer of the defendant for impertinence and scandal respectively, I, subscriber appointed by said order Special Master for said purpose, do respectfully report:

That pursuant to said reference I set the 19th day of December, 1905, at my office in the City of Los Angeles, in said District
118 for proceeding in the same, and gave due notice thereof to each of the parties and their solicitors; and thereupon, on said 19th day of December, 1905, I was attended by counsel for complainants, Alfred Sutro, Esq., of Messrs. Pillsbury, Madison & Sutro, and Willoughby Rodman, Esq., of counsel, solicitors for complainant, and by Robert Loucks, Esq., solicitor for defendants, who severally presented and argued on behalf of the complainant and of the defendants the said exceptions to the said answer for impertinence and scandal as hereinafter set forth; and having proceeded and examined the several exceptions of the complainant for impertinence and scandal respectively to said answer, and having considered the same, I do report—

That exceptions 1 to 8, inclusive, to the passages of said answer, as follows:

First Exception: Beginning with the words "that if under," on line 16 of page 5, and ending with the words "could not have," on line 25 of page 5 thereof, as follows:

"that if under any circumstances or conditions, it did file with the Postmaster-General and acceptance in writing as alleged in said

paragraph II, that the same was but a subterfuge, and was not done in good faith, but was done for the purpose of giving the said complainant an opportunity of claiming that it was carrying on a telegraph business and thereby give to its telephone business rights and privileges which said complainant, as a telephone corporation pure and simple, could not have"; also

119 Second Exception: The following part of paragraph II of said answer, to-wit; beginning with the words 'and that the said complainant," on line 25 of page 5 thereof, and ending with the words "or any message whatsoever," on line 2 of page 6 thereof, as follows:

"and that the said complainant did not in good faith accept any reservation or restrictions or obligations contained in or provided for by said Act of Congress of July 24, 1866, and particularly with any view or expectation on the part of the said complainant, that it would ever or at any time be called upon by the Government of the United States to receive, transmit, send or deliver telegraphic messages, or any messages whatsoever"; also

Third Exceeption: Of paragraph II of said answer, to-wit: beginning with the words "and that said," on line 2, page 6 thereof, and ending with the words "provided by said Act," on line 11 of page 6 thereof, as follows:

"And that said complainant at all times well knew that it was filing said written assent and consent, if the same ever was filed by it, as a mere subterfuge and blind, and for the purpose of giving it an apparent but not a real right to bring and prosecute actions, on the theory that it was a telegraph company doing a telegraph business, with obligations to the United States Government to receive, transmit and deliver interstate telegraphic messages for the said Government, as provided by said Act," also

120 Fourth Exception: That part of paragraph II, to wit; beginning with the words "and these respondents," on line 11 of page 6 thereof, and ending with the word "business," on line 17 of page 6 thereof, as follows:

"and these respondents allege that the said subterfuge, misconduct and fraud on the part of said complainant is now presented to this Court by the said bill of complaint for purposes of misleading this Court and of causing this Court to conclude and believe that the said complainant is a telegraph company conducting a telegraph business"; also

Fifth Exception: The following part of paragraph II of said answer, to wit: beginning with the words "And in," on line 24 of page of page 6 thereof, and ending with the word "business," on line 17 of page 7 thereof, as follows:

"And in further evidence of the lack of good faith of the said complainant and of the fraud of said complainant in bringing this action, these respondents allege that it is a fact, and at all times was known by said complainant to be a fact, that none of the respondents herein were at any time cutting down or interfering with, or at any of the times alleged in the complaint, threatening to cut down,

destroy or interfere with any wire or lines of the said complainant leading into or out of the said City of Pomona which at any time was ever used by the said complainant transmitting any message
121 whether by articulate speech or telegraphic instruments between the said City of Pomona and any outside place either in the State of California or other place"; also

Sixth Exception: That part of paragraph II, to wit: beginning with the word "but," on line 6 of page 7 thereof, and ending with the word "elsewhere," on line 28 of page 7 thereof, as follows:

"but the said complainant at the time of filing its said complaint well knew that these respondents had not and were not threatening or intending to cut down, destroy or interfere with any poles, wires or other appliances of the said complainant within the said City of Pomona, except those used exclusively in a purely local telephone business connecting individual subscribers and their places of business and their places of residence with the telephone exchange of the said complainant in the said City of Pomona, and that none of these respondents had, nor were they threatening to cut down, destroy or interfere with any pole, line or wire by means of which any telegraphic communication had ever been, or could be sent or transmitted by telegraphic instruments, such as are described in paragraph II of said bill of complaint, and the said complainant at the time of filing its said bill and prior thereto, well knew that none of these respondents had interfered with or destroyed, or intended to interfere with or destroy any of the lines or poles or instruments or other appliances of the said complainant through
122 or by means of which any telegraphic message could be sent from the said City of Pomona to any other place whatsoever whether within the State of California or elsewhere"; also

Seventh Exception: That part of paragraph II, to wit: beginning with the words "and these," on line 29 of page 7 thereof, and ending with the word "hands," on line 4 of page 8 thereof, as follows: "and these respondents again allege that the said bill of complaint was not filed nor the said action brought in good faith, or with the intent on the part of the said complainant that equity should be done, and the said complainant has not come into this Court of Equity with clean hands" also

Eighth Exception: That part of paragraph II, to wit: beginning with the words "but has come," on line 4 of page 8 thereof, and ending with the words "to do and perform" on line 11 of page 8 thereof, as follows:

"but has come with fraud and an intent to deceive this Court and mislead this Court in order that the extraordinary remedy of injunction might be granted to it by this Court, restraining and enjoining these respondents, and particularly the City of Pomona, from doing that which under the laws of the State of California, and of the Government of the United States, it has a right to do, and which under the said laws, it is its duty to do and perform,"

for impertinence and scandal should be sustained.

These averments and allegations of the answer meet no
123 allegations of the complaint that is not already met by the denials of the answer and unnecessarily reflect upon the plaintiff in the cause.

II.

For the same reason exceptions 10, 11, 12, and 15 for impertinence, and 9, 10, 11, 13, for scandal, must be sustained, as follows:

Tenth Exception for impertinence; and

Ninth Exception for scandal, beginning at the words "and that said facts," on line 16 of page 10 thereof, and ending with the words "which are untrue," on line 21, page 10 thereof, as follows:

"and that said facts, ever since the said month of August, 1898, have been known and at the time of the filing of its bill of complaint, herein were known by the said complainant, and the said complainant in that behalf, as well as otherwise, in knowingly setting forth in its bill to this Court, statements which are untrue"; also

Eleventh Exception for impertinence; and

Tenth Exception for scandal: beginning with the words "the said allegations" on line 5 of page 12 thereof, and ending with the word "complainant" on line 12 of page 12 thereof, as follows:

"the said allegations so last above denied, contained in the said paragraph III, are inserted in the said bill of complaint for the purpose of leading this Court to believe that the officers of the several Departments of the Government of the United States and their officers and agents have interchanged and sent telegrams from one to the other over the lines of the said complainant"; also

124 Twelfth Exception for impertinence; and

Eleventh Exception for scandal: beginning with the words "said allegations are," on line 14, page 12 thereof, ending with the words "capacity of such" on line 24, page 12 thereof, as follows:

"said allegations are subterfuges and are intended to mislead this Court because of and for the reason that, as these respondents are informed and believe and so allege, the said complainant has never been called upon to accept or transmit any telegraphic message between any Departments of the Government of the United States and any other department or any officer or agent of said Government, or any telegraphic message whatsoever on the part of or for or by any officer of the Government of the United States, or the State of California in his public capacity as such"; also

Sixteenth Exception for impertinence; and

Thirteenth Exception for scandal: beginning with the words "that the use" on line 16, page 15 thereof, and ending with the word "California" on line 26, page 26 thereof, as follows:

"that the use by it of the term 'Telegraph' in the said complaint and particularly in paragraph V thereof, was a subterfuge and a fraud and for the purpose and intended as such by said complainant, of misleading this Court into believing that it did in fact conduct, carry on, maintain and operate a telegraph business in said City of Pomona, and particularly interstate

telegraph business, in connection with which, telegraph messages were, have been and are transmitted from and to the said
125 City of Pomona to and from places and cities in the United States outside of the State of California."

III.

Exeptions 24 and 26 for impertinence, and 14 and 15 for scandal, as follows:

Exception Twenty-fourth for impertinence; and

Fourteenth Exception for scandal: beginning with the word "as" on line 11, page 24 thereof, and ending with the words "well know" on line 13, page 24 thereof, as follows:

"as this Court well knows and as complainant and its several counsel well knew"; also

Twenty-sixth Exception for impertinence; and

Fifteenth Exception for scandal, as follows; beginning with the words "that said complainant" on line 21, page 24 thereof, and ending with the word "equity" on line 31 of page 24 thereof, as follows:

"that said complainant and its said counsel at the time of the filing of said bill, well knew that the allegations so made and stated by it were not made in good faith or with the idea or belief on the part of said complainant that any such contract was or could have been entered into as is therein described, or that any such proposition could have been made and accepted by said Board of Trustees, and said allegations in said bill of complaint constitute further evidence of fraud on the part of said complainant and of its intent to try and deceive this court to grant relief to which it is not entitled in la wor in equity,"

should be sustained for impertinence and scandal.

126 IV.

Thirty-second Exception for impertinence, and

Sixteenth Exception for scandal: beginning with the words "that the said" on line 3 of page 27 thereof, and ending with the word "thereof" on line 19 of page 27 thereof, as follows:

"that the said complainant and the said Pacific States Telephone & Telegraph Co., and the said Western Union Telegraph Co., and the said Postal Telegraph & Cable Co., have entered into a compact or agreement or compacts or agreements by which said complainant long prior to the year 1903, agreed and ever since has agreed, not to receive, transmit or deliver any message either by telegraph or by telephone except that the senders and receivers of said messages are themselves at their respective phones and themselves send and deliver the said messages, and that the said complainant and its associate company, the said Pacific States Telephone & Telegraph Co. have agreed with the said Western Union Telegraph Co. and the said Postal Telegraph & Cable Co. not to receive or deliver any messages

whatsoever, in particular any messages where the same are not sent and transmitted by the articulate speech of the sender thereof,"

should be sustained for impertinence and scandal.

V.

Thirty-third Exception for impertinence, and
Seventeenth Exception for scandal: beginning with the word "claiming on line 2 of page 31 thereof, and ending with
127 the word "City" on line 14 of page 31 thereof, as follows:

"claiming that because of the use of the word 'telegraph' in its articles of incorporation, it is above and beyond the laws of the State of California, and the ordinances and the laws of the said City, and that it could as it saw fit, regardless of the rights of the said City and its citizens, do as it would and as it pleased with its streets, avenues and alleys in the way of maintaining, constructing and operating poles and lines in, along, over and across the same, and said complainant has shown itself unwilling to abide by the laws, and now seeks by this proceeding to obtain rights and privileges contrary to and in violation of the laws of the State of Califronia and of the ordinances of said City."

should be sustained for impertinence and scandal.

VI.

Thirty-seventh Exception for impertinence, and
Eighteenth Exception for scandal: beginning with the words "And admit" on line 28 of page 33 thereof, and ending with the word "places" on line 8 of page 34 thereof, as follows:

"And admit that the amount of any such loss and detriment will not be susceptible of pecuniary estimation and determination solely and wholly for the reason and becau-e that no figures or standard of measurement could be found or is now known which are or is small enough to measure or estimate any such possible pecuniary loss to which the complainant might be put by any interference with
128 its telegraphic business in said City of Pomona, or any business in connection with the transmission of long distance messages by telegraph from said City of Pomona to outside places,"

should be sustained for impertinence and scandal.

VII.

Exceptions 15, 41 and 43 for impertinence, and 12, 19 and 20 for scandal, as follows:

Fifteenth Exception for impertinence, and
Twelfth Exception for scandal: beginning with the words "That on said" on line 7 of page 14 thereof, and ending with the word "inhabitants" on line 11 of page 14 thereof, as follows:

"That on said July 19, 1905, and prior and continually since complainant has ignored and disobeyed the legislative wish of Said

Board of Trustees and has been and now is in contempt of said City of Pomona, its Board of Trustees, and citizens and inhabitants"; also.

Forty-first Exception for impertinence, and

Nineteenth Exception for scandal: beginning with the word "showing" on line 10 of page 38 thereof, and ending with the words "and inhabitants" on lines 12 and 13, page 38 thereof, as follows:

"showing its contempt for the said City of Pomona and for its authority and for its rights and the rights of its citizens and inhabitants"; also

Forty-third Exception for impertinence, and

Twentieth Exception for scandal: beginning with the words "in contempt of" on line 18 of page 38 thereof, and ending with the words "residents thereof" on line 22 of page 38 thereof, as follows:

129 "in contempt of the authority of said city and in contempt of its ordinances and of its laws, and in contempt of the laws and statutes of the State of California, and in contempt of the rights of said city and of the inhabitants and residents thereof,"

should be sustained for impertinence and scandal.

VIII.

Exceptions 44, 45, 46, 47, 48, 49 and 51 for impertinence, and 21, 22, 23, 24, 25, 26 and 27 for scandal as follows:

Forty-fourth Exception for impertinence, and

Twenty-first Exception for scandal: beginning with the words "said complainant" on line 15 of page 39 thereof, and ending with the word "business" on line 21 of page 39 thereof as follows:

"said complainant is now and at all the times since the filing of its bill of complaint was violating the laws of the United States and the laws of the State of California governing and controlling public corporations, and particularly corporations organized for the purpose of carrying on a public telephone or telegraph business"; also

Forty-fifth Exception for impertinence, and

Twenty-second Exception for scandal: Beginning with the word "particularly" on line 21 of page 39 thereof, and ending with the word "company" on line 24 of page 39 thereof, as follows:

"particularly in that said complainant has associated itself intimately with another corporation organized under the laws of the State of Oregon, known as the Pacific States Telephone and Tele-
130 graph Company"; also

Forty-sixth Exception for impertinence, and

Twenty-third Exception for scandal: beginning with the word "with" on line 24 of page 39 thereof, and ending with the word "business" on line 2 of page 40 thereof, as follows:

"with the idea and for the purpose of having said Pacific States Telephone and Telegraph Company to secretly arrange and agree to

carry and deliver all long distance messages between cities, and have entered into other compacts and agreements by which they agree mutually, one with the other, not to compete or erect competing lines, but to maintain extravagant prices and charges for telephone business"; also

Forty-seventh Exception for impertinence, and

Twenty-fourth Exception for scandal: beginning with the words "with the officers" on line 2 of page 40 thereof, and ending with the word "complainant" on line 4 of page 40 thereof, as follows:

"that the officers of said Pacific States Telephone and Telegraph Company are, and always have been practically the same as the officers of the said complainant"; also

Forty-eighth Exception for impertinence, and

Twenty-fifth Exception for scandal: beginning with the word "and" on line 4 of page 40 thereof, and ending with the word "State" on line 10 of page 40 thereof, as follows:

"and that this complainant is but a corporate instrument in the hands of said Pacific States Telephone and Telegraph Com-
131 pany for the purpose of enabling the said Pacific States Telephone and Telegraph Company to evade the laws of the United States and of the State of California and the ordinances of the various cities of the said State"; also

Forty-ninth Exception for impertinence, and

Twenty-sixth Exception for scandal; beginning with the words "and that" on line 10 of page 40 thereof, and ending with the word "Company" on line 13 of page 40 thereof, as follows:

"and that all or practically all of the stock of the said complainant is owned by the said Pacific States Telephone and Telegraph Company"; also

Fifty-first Exception for impertinence, and

Twenty-seventh Exception for scandal: beginning with the words "that certain" on line 17, page 40 thereof, and ending with the word "State" on line 24 of page 40 thereof, as follows:

"that certain of the local telephone lines, particularly the lines within certain cities of the State of California, and particularly the local telephone lines of the said City of Pomona, are allowed to be owned by, operated by and put in the name of the above-named complainant, in order to avoid certain of the laws of the United States and of the State of California and of certain ordinances of the several cities of the said State,"

and each of them should be sustained for impertinence and scandal.

IX.

Thirteenth Exception for impertinence: beginning with
132 the word "whereupon" on line 28 of page 13 thereof, and ending with the words "in said city" on line 2 of page 14 thereof, as follows:

"whereupon, and thereafter, and after full deliberation and consideration said Board of Trustees decided that said complainant company had no franchise rights or any right whatever to do business in said city,"

should be sustained for impertinence. What the Board of Trustees of the defendant, the City of Pomona, decided as to whether or not the complainant had a franchise to do business in said city, is irrelevant and immaterial.

X.

Seventeenth Exception: beginning with the words "that said long" on line 1 of page 17 thereof, and ending with the word "complainant" on line 6 of page 7 thereof, as follows:

"that said long distance wires and all of the same, at all of the times mentioned in complainant's bill of complaint, were and now are being maintained, operated, owned and controlled by a certain corporation known as the Pacific States Telephone & Telegraph Company, a corporation, and not by complainant"; also

Eighteenth Exception: beginning with the words "and that each" on line 7 of page 17 thereof, and ending with the words "rented the same" on line 18, page 17 thereof, as follows:

"and that each and every subscriber to the telephones described in paragraph VI, who used the said long distance wires, or any
133 thereof, used the same solely by means of the telephone, and transmitted their messages by articulate speech, and that each of said subscribers *are* charged therefor by the said Pacific States Telephone & Telegraph Company, and *are* obliged to pay the Pacific States Telephone & Telegraph Company for such use and for such service, as the same is performed, and that the said complainant at none of the times mentioned in said bill of complaint has operated or controlled or maintained the said long distance wire or charged for the use thereof, or rented the same,"

and each of said exceptions should be sustained for impertinence. It is immaterial what is the connection of the complainant with the Pacific States Telephone & Telegraph Company or what contracts there are existing between the complainant and said Pacific States Telephone & Telegraph Company for the use of service so far as the determination of this suit is concerned.

XI.

Twenty-first Exception for impertinence: beginning with the words "and which public" on line 28 of page 19 thereof, and ending with the word "alleys" on line 9 of page 20 thereof, as follows:

"and which public nuisance and nuisances your respondents pray this Court to abate, and your respondents will ask at the conclusion of this, their answer, and by its prayer herein, relief against the said complainant that the said nuisances be abated and the said com-

plainant be ordered to remove the said poles, wires, arms,
134 apparatus and appliances from the said streets, alleys, and avenues, and will ask that the complainant be forever enjoined and restrained from either maintaining, erecting, or operating any of said poles, arms, wires, apparatus or appliances along, in, over or across any of the said streets, avenues, or alleys,"

should be sustained for impertinence. It is not proper in the denials of the answer to pray for relief, and the matter last aforesaid presents no issue.

XII.

Twenty-second Exception for impertinence; beginning with the word "in" on line 3 of page 22 thereof, and ending with the word "street" on line 7 of page 22 thereof, as follows:

"in common with others and other persons and other corporations, then maintaining and operating poles, wires, telephone and telegraph lines and other lines along said paved portions of said Second Street"

should be sustained for impertinence. What other persons or corporations, maintaining and operating poles in said city, did is immaterial in connection with the acts of the complainant in said cause.

XIII.

Twenty-third Exception for impertinence: beginning with the words "the said paved" on line 30 of page 22 thereof, and ending with the word "City" on line 15 of page 23 thereof, as follows:

"the said paved portion of said Second Street is the main business street of the said City of Pomona, and that the poles and
135 lines and other appliances, at the time of the adoption of the said resolution of intention and instruction and proceedings owned by the said complainant and by said other persons and corporations, constituted a menace to the said city and the property of the residents thereof and that it was necessary as a police regulation at that time that said poles and line should be removed from said portion of said Second Street, which facts were so apparent that each and every owner of any of said lines, poles and appliances, including the complainant herein, immediately and without waiting for the passage or adoption of said ordinance removed their said several poles, lines and appliances therefrom to other streets and alleys within said city,"

should be sustained for impertinence. The allegation therein contained is wholly immaterial.

XIV.

Exceptions 27, 28, 29, 30, 31, for impertinence:

Twenty-seventh Exception: Beginning with the words "they have been" on line 15, page 26 thereof, and ending with the word "speech" on line 2, page 26½ thereof, as follows:

"they have been and each of them has been a resident and citizen of the said City of Pomona for more than ten years last past, and that as such residents and citizens of said city, they have been and are familiar with the business of all public institutions and quasi-public institutions doing business in said city, and that they are familiar with the business and the ostensible business at all of
136 said times done and now being done by the said complainant in the said City of Pomona, and that they do most respectfully allege and state that never, until this controversy arose, did they ever hear or understand, or that it was ever claimed that the said complainant was doing any business in the said city other than a purely telephone business, where messages were being transmitted exclusively by means of telephone instruments and articulate speech"; also

Twenty-eighth Exception: beginning with the words "it has not" on line 7 of page 26½ thereof, and ending with the words "and employees" on line 7, page 26½ thereof, as follows:

"if the said complainant has ever received or transmitted or delivered any telegraph message whatsoever during any time for more than — years last past, such act has been rare or connected with its own business from or to its own agents and employees"; also

Twenty-ninth Exception: beginning with the words "it has not" on line 7, of page 26½ thereof, and ending with the word "message" on line 9, page 26½ thereof, as follows:

"it has not, so far as these respondents are aware, ever advertised or publicly offered to receive or transmit any telegraph message"; also

Thirtieth Exception: beginning with the words "in the conduct" on line 10, of page 26½ thereof, and ending with the word "business" on line 13 of page 26½ thereof, as follows:

137 "in the conduct and in the management of its business in said City of Pomona and elsewhere, the said complainant advertised to do a strictly telephone business and does not advertise to do a telegraph business"; also

Thirty-first Exception: beginning with the word "on" on line 13 of page 26½ thereof, and ending with the words "last past" on line 22 of page 26½ thereof, as follows:

"on the contrary, these respondents allege that the Western Union and the Postal Telegraph & Cable Company have telegraph wires leading through, into and from the said City of Pomona, and that so far as these respondents know, or ever have known, and so far as the public generally know, or ever has known, the entire telegraphic business of the said City of Pomona has been done by the said two telegraph companies for all of the time last past,"

and each of said exceptions should be sustained for impertinence.

The allegations of said complainant in said paragraphs last above mentioned present wholly immaterial matters and not necessary to the determination of this suit.

XV.

Thirty-sixth Exception for impertinence: beginning with the word "particularly" on line 18, page 33 thereof, and ending with the words "its said lines" on line 22, page 33 thereof as follows:

"particularly for the reason that the said Government, or the said departments thereof, never have, and in all probability never
138 will apply to said complainant that it, said complainant, transmit any telegraphic messages over any of its said lines,"

should be sustained for impertinence. The allegation is wholly irrelevant.

XVI.

Exceptions 38, 39 and 40 for impertinence:

Thirty-eighth Exception for impertinence: beginning with the word "and" on line 25 of page 37 thereof, and ending with the word "franchise" on line 1 of page 28 thereof, as follows:

"and as hereinafter alleged, ever since the expiration of said franchise, the said City of Pomona, by its various officers, and particularly by and through its City Attorney and its Board of Trustees, has tried to induce the said complainant to apply for a renewal of said franchise, or for a new franchise"; also

Thirty-ninth Exception: Beginning with the words "in order that," on line 1 of page 38 thereof, and ending with the word "city" on line 3, page 38 thereof, as follows:

"in order that it might not be in the position of maintaining a public nuisance in the streets of the said city"; also

Fortieth Exception: Beginning with the words "and in order," on line 3 of page 38 thereof, and ending with the word "complainant," on line 10 of page 38 thereof, as follows:

"and in order that the said city might not be in the position of having its streets, alleys and avenues occupied and in the possession of a quasi-public corporation having no right to occupy, use
139 or possess the same, particularly for the purposes and in the manner for and in which the same ever since the said month of August, 1898, having been possessed, occupied and used by the said complainant";

should be sustained for impertinence: The efforts of the City Attorney and Board of Trustees of the defendant, the City of Pomona, to induce the complainant to apply for a renewal of its franchises for no reason whatever are material to this case, and the reasons charged are therefore immaterial.

XVII.

Fiftieth Exception for impertinence: Beginning with the words "and that" on line 13 of page 40 thereof, and ending with the word "California" on line 17 of page 40 thereof, as follows:

"and that said Pacific States Telephone and Telegraph Company, in fact, is the owner of the telephone and telegraph lines connecting the said City of Pomona with the outside places and particularly with places outside of the State of California";

should be sustained for impertinence. As before said, the connection of the complainant with the Pacific States Telephone & Telegraph Company is immaterial in this matter.

XVIII.

Exceptions 9, 14, 19, 20, 34, 35 and 42 for impertinence.

140 Ninth Exception: Beginning with the words "that said poles" on line 24 of page 9 thereof, and ending with the word "therein" on line 31 of page 9 thereof, as follows:

"that the said poles, wires, arms and other apparati constructed, erected, maintained and operated by the said complainant in and along the roads, streets, alleys and highways of the said City of Pomona, and particularly all of the said poles and other appliances used in connection with the local telephone exchange business in said city, do obstruct said streets, roads and alleys and constitute nuisances therein"; also.

Fourteenth Exception: Beginning with the words "and on August" on line 2 of page 14 thereof, and ending with the word "Pomona" on line 6 of page 14 thereof, as follows:

"and on August 1, 1905, said Board of Trustees duly passed its resolution of that date declaring the poles, wires and apparatus of said complainant a public nuisance and an obstruction on the streets of the said City of Pomona"; also

Nineteenth Exception: Beginning with the words "that ever since" on line 14 of page 19 thereof, and ending with the word "alleys" on line 23 of page 19 thereof, as follows:

"that ever since said month of August, 1898, the said complainant has and does now maintain, operate and construct public nuisances in, along and over and across the said public streets, avenues and alleys of the said City of Pomona by means of and by and

141 with the poles, arms, wires, apparatus and appliances described by the said complainant in its said bill of complaint, as having been erected, constructed, maintained and operated by it, over, along and across the said streets, avenues and alleys"; also

Twentieth Exception: Beginning with the words "that by means" on line 23 of page 19 thereof, and ending with the word "Pomona" on line 28 of page 19 thereof, as follows:

"that by means of the said poles, arms, wires, apparatus and appliances the said complainant ever since the said month of August, 1898, has maintained, and is now maintaining public nuisances in, along, across and over the several public streets, avenues and alleys and highways of the said City of Pomona"; also

Thirty-fourth Exception: Beginning with the words "and the

same" on line 19 of page 32 thereof, and ending with the words "said city" on line 21 of page 32 thereof, is as follows:

"and the same were public nuisances to be abated in accordance with the resolutions of the Board of Trustees of said city"; also

Thirty-fifth Exception: Beginning with the words "and the same" on line 21 of page 32 thereof, and ending with the word "city" on line 24 of page 32 thereof, as follows:

"and the same were by these respondents, as officers of said city, cut down and abated as and being public nuisances in the streets of said city, and on the orders and directions of the Board of
142 Trustees of said city"; also

Forty-second Exception: Beginning with the words "has declined" on line 13, page 38, thereof, and ending with the words "or permission" on line 14 of page 38 thereof, as follows:

"has declined to ask for any further franchise or permission,"

and each of said exceptions for impertinence are not well taken, and should be overruled.

Exception Fourteen last above mentioned should be treated as an admission of the allegation of the complaint as to the resolution adopted by the Board of Trustees of the defendant City of Pomona on the first day of August, 1901, and which is attached to said complainant's bill as Exhibit 3 thereof, and as such admission should be overruled.

All of the last series of exceptions refer to matter which is set up in the answer and raises the question as to whether or not the complainant is maintaining a nuisance and obstruction in the City of Pomona.

The several reasons set up by the complainant for relief in this matter should all be subject to the recognition of the proper exercise of the police power by the municipal corporation and the use by the complainant of its poles and lines should not be in such a manner as to create within the City of Pomona a nuisance or obstruction in the streets, but said poles and lines should be declared to be subject to such regulations and restrictions as may now or hereafter
143 be imposed by the City of Pomona in the Proper and lawful exercise of the police power.

Richmond vs. Southern Bell Telephone Co., 174 U. S. 761.

For this reason it is proper for the defendant in its answer to assert and allege as a reason why the relief should not be granted the complainant, that the poles of the complainant in the streets of Pomona are a nuisance and obstruction, and the issue is properly raised and should be determined by this Court.

XIX.

Twenty-fifth Exception for impertinence: Beginning with the word "neither" on line 13 of page 24 thereof, and ending with the word "six" on line 20 of page 24 thereof, as follows:

"neither the said City of Pomona nor the said Board of Trustees thereof, nor any members of said Board, at any time, had or has any right, power or authority whatsoever to grant or concede any such right or privileges as are claimed and set forth in that portion of paragraph six of said complaint, commencing with line 3 of page 13 thereof, being all of the last three pages and more of said paragraph six."

is not well taken, and should be overruled.

If the contract alleged to have been made between the complainant and the defendant, the City of Pomona, was ultra vires of said defendant corporation, it is for the said defendant corporation relying thereupon, to plead it and establish it by proof.

144 The allegation is therefore material in the answer as raising a defense desired to be made by the said defendant to the allegations of said complaint.

Having fully examined all of the said exceptions for impertinence and scandal, as aforesaid, this report is respectfully submitted.

Respectfully submitted,

LYNN HELM, *Special Master.*

January 15, 1906.

[Endorsed:] No. 1209. In the Circuit Court of the United States, Ninth Circuit, Southern District of California. Sunset Telephone & Telegraph Co., Plaintiff, vs. City of Pomona et al., Defendant. Report of Special Master on Exceptions for Impertinence and Scandal. Filed Jan. 16, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Lynn Helm, Attorney for —— ——, Los Angeles, California.

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) et al., Respondents.

145 *Exceptions of Defendants to Report of Special Master.*

To the Honorable Judges of the Circuit Court of the United States, Southern District of California, Southern Division, in Chancery Sitting:

Come now the defendants in the above-entitled case and except to the report of Lynn Helm, Special Master, filed herein on the 16th day of January, 1906, and to each and every part thereof sustaining the exceptions of complainant herein for impertinence and scandal, and striking out parts of defendants' answer herein, and that said Special Master erred particularly in the following specified para-

graphs of his said report, and that said defendants except to the ruling of said Special Master made in and under the following paragraphs of his said report as follows, to wit:

Paragraph I. Containing exceptions 1 to 8, inclusive, for impertinence and scandal.

Paragraph II. Containing exceptions 10, 11, 12 and 16, for impertinence, and 9, 10 11 and 13 for scandal.

Paragraph III. Containing exceptions 24 and 26 for impertinence, and 14 and 15 for scandal.

Paragraph IV. Containing exception 32 for impertinence and 16 for scandal.

Paragraph V. Containing exception 33 for impertinence and 17 for scandal.

146 Paragraph VI. Containing exception 37 for impertinence and 18 for scandal.

Paragraph VII. Containing exceptions 15, 41 and 43 for impertinence, and 12, 19 and 20 for scandal.

Paragraph VIII. Containing exceptions 44, 45, 46, 47, 48, 49 and 51 for impertinence, and 21, 22, 23, 24, 25, 26 and 27 for scandal.

Paragraph IX. Containing exception 13 for impertinence.

Paragraph X. Containing exceptions 17 and 18 for impertinence.

Paragraph XI. Containing exception 21 for impertinence.

Paragraph XII. Containing exception 22 for impertinence.

Paragraph XIII. Containing exception 23 for impertinence.

Paragraph XIV. Containing exceptions 27, 28, 29, 30 and 31 for impertinence.

Paragraph XV. Containing exception 36 for impertinence.

Paragraph XVI. Containing exceptions 38, 39 and 40 for impertinence; and

Paragraph XVII. Containing exception 50 for impertinence.

ROBERT G. LOUCKS,
Solicitor for Respondents.

March 16th, 1906.

147 Received copy of the within exceptions this 16th day of March, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, 9th Judicial Circuit Southern District. Sunset Telephone & Telegraph Co., Complt., vs. City of Pomona et al., Rspdts. Exceptions to Report of Special Master. Filed Mar. 1, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

[*Order, Dated May* 14, 1906.]

At a stated term to wit, the January Term, A. D. 1906, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the fourteenth day of May, in the year of our Lord one thousand nine hundred and six. Present: The Honorable Olin Wellborn, District Judge.

148 No. 1209.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) et al., Defendants.

This cause coming on this day to be heard on defendants' motion that the Court order and compel complainant in the above-entitled cause to make a full and true copy of E. S. Pillsbury's letter, which said letter is made a part of his affidavit dated January 18th, 1906, and was filed with the clerk of this court on the 20th day of January, 1906, and also to be heard on defendants' exceptions to the report of the Special Master herein; and also to be heard on complainant's exceptions to defendants' answer for insufficiency, and also to be heard on defendants' motion for leave to file herein a supplemental answer, and also to be heard on defendants' motion for leave to file an amended answer herein; Alfred Sutro, Esq., and Willoughby Rodman, Esq., appearing as counsel for complainant, and Robert G. Loucks, Esq., appearing as counsel for defendants; and said motion to compel complainant to make a full and true copy of the letter of E. S. Pillsbury, which said letter is made a part of his affidavit dated January 18th, 1906, and was filed with the clerk of
149 this court on January 20th, 1906, having been presented to the Court by counsel for the respective parties, it is by the Court ordered that said motion be, and the same hereby is, denied, but that defendants be, and they hereby are, allowed to file herein a complete copy of said letter, and thereupon it is stipulated in open court that the words set forth in the affidavit of Robert G. Loucks, which purport to be a copy of the words comprising the letterhead of said letter are a correct copy of said words comprising the letterhead of said letter; and defendants' exceptions to the Report of the Special Master herein having thereupon been argued by counsel for the respective parties, it is now by the Court ordered that said exceptions to the Report of the Special Master be, and said exceptions hereby are overruled, and that said Special Master's Report be, and the same hereby is sustained; it is further ordered that the fee of the Special Master herein be, and the same hereby is fixed at $250.00, and that $25.60 thereof be paid by complainant, and the balance, $224.40 be paid by defendants; and complainant's excep-

tions to defendants' answer for insufficiency having thereupon been argued by counsel for the respective parties, and submitted to the Court for its consideration and decision, it is now by the Court ordered that said exceptions be, and they hereby are sustained; and defendants' motion for leave to file herein a supplemental answer having thereupon been argued by counsel for the respective parties,
and submitted to the Court for its consideration and decision,
150 it is by the Court ordered that said motion for leave to file a
supplemental answer herein be, and the same hereby is denied; and defendants' motion for leave to file herein an amended answer having been partially argued, it is now, at the hour of 12:15 o'clock P. M., ordered that said cause be, and the same hereby is continued for further argument until the hour of 2:15 o'clock P. M. of this day;

And Court thereupon, at the hour of 12:15 o'clock P. M., having taken a recess until the hour of 2:15 o'clock P. M. of this day;

And now, at the hour of 2:15 o'clock P. M., Court having reconvened, and counsel being present as before, and said motion for leave to file herein an amended answer having been further argued by counsel for defendants and submitted to the Court for its consideration and decision, it is now by the Court ordered that defendants be, and they hereby are granted until the July Rule Day of this Court in which to file an amended answer herein; it is further ordered, on motion of counsel for complainant, that complainant have, and it is hereby granted until the August Rule Day of this Court in which to file its replication; defendants thereupon, by their said counsel, Robert G. Loucks, Esq., note and are allowed exceptions to all rulings of the Court this day entered herein adverse to said defendants, which said exceptions are hereby entered herein. On motion of counsel for defendants it is further ordered that
defendants have leave to withdraw one of the maps hereto-
151 fore filed herein on behalf of defendants; and thereafter, at
the hour of 4:34 o'clock P. M., said cause coming on for further hearing in the matter of the apportionment of the fee heretofore allowed the Special Master, and counsel having been heard upon said matter, it is now by the Court ordered that said fee be reapportioned as follows: That the defendants pay of said amount of $250.00 the sum of $210.75, and that the complainant pay the sum of $39.25, said amounts to be paid at once.

In the United States Circuit Court, in the Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Amended Answer of Certain Respondents to Complainant's Bill.

To the Honorable the Justices of the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, Sitting in Equity:

Come now the City of Pomona (a municipal corporation), and the Board of Trustees of said City of Pomona, Mel Campbell,
152 N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker (improperly sued herein as S. C. Slemker), as the Superintendent of the streets in and for the said City of Pomona, R. G. Loucks, as City Attorney of said City of Pomona, and S. C. Slanker (improperly sued herein as S. C. Slemker), and R. G. Loucks, respondents in the above-entitled case, and making amended answer to the bill in equity filed against them in the above-entitled cause, now and at all times hereafter, saving unto themselves and each of them all and all manner of benefit of exceptions to all rulings heretofore made in this case, and also, likewise saving any exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, do say, amend, deny and allege as follows, to wit:

I.

Admit that complainant is and at all the times in this bill of complaint mentioned was a corporation organized and existing under and by virtue of the laws of the State of California; but these respondents deny that said complainant is a Telephone or Telegraph Company or a Telephone and Telegraph Company, or that it was at all or at any time authorized or empowered by its Articles of Incorporation to do a general telephone and telegraph or a general telephone or telegraph business, or that as such corporation, it has constructed or established, or now main-
153 tains or operates extensive telephone or telegraph lines or poles, or system, or apparatus or appliances for the purpose of transmitting intelligence by electricity through means of telegraph instruments, or through means of telephone or telegraph instruments, in either the States of California, Oregon, Washington, Idaho or Nevada, and for the same reasons and so denying,

deny that at any time in the transaction of its business, or as a part thereof, or by the use of its said systems, or by the use of any systems, complainant transmits and delivers or transmits or delivers by means of its said lines, or by any means whatsoever, telephonic messages or telegraphic communications originating at any point inside or outside of the State of California, either to the points or places within said City of Pomona, or to any other points or places within said State, or that said complainant by any means whatsoever transmits any messages or communications to or from the said City of Pomono or between different places within the said City of Pomona by means of said telegraphic instruments, or by means of any other instruments or appliances whatsoever, other than by what is known as the local telephone system, viz.: its system of communications by articulate speech, within said City of Pomona, said communications being made by the party sending the communication directly through the telephone instrument and telephone appliances to the party receiving the message, and the same being by articulate speech, and not otherwise.

154 These respondents admit that ever since the 6th day of January, 1888, the said City of Pomona is and has been a body politic, a corporation of the fifth class, organized and existing under and by virtue of the laws of the State of California, and forming a municipal corporation of and in said State of California, in the County of Los Angeles, said State, by the name and style of the City of Pomona.

Admit that the respondents, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery are now and ever since the — day of April, 1905, have been the duly elected, qualified and acting Board of Trustees of the said City of Pomona and have constituted and do now constitute the said Board of Trustees:

Admit that the respondent S. C. Slanker (sued herein as S. C. Slemker), now is, and ever since the — day of January, 1905, has been the duly elected, qualified and acting Superintendent of Streets of said City of Pomona;

Admit that the respondent, R. G. Loucks, now is and ever since the — day of January, 1905, has been the duly elected, qualified and acting City Attorney, of the said City of Pomona, and that all of said respondents will hold office during the year 1905;

Admit that these answering respondents are and each of them is a citizen and resident of the State of California, and of the Southern District of said State.

II.

155 These respondents deny each and every allegation in paragraph II contained, and deny that on the 4th day of December, 1897, or at any other time, complainant in writing or otherwise, without reservation or at all, accepted the restrictions or obligations of the Act of Congress approved July 24, 1866, entitled: "An Act to aid in the construction of Telegraph Lines and to Secure to the Government the use of the Same for Postal, Military and Other Purposes," or that thereafter, on the 14th day

of December, 1897, or at any other time, complainant filed said written consent with the Postmaster-General in any manner or at all, or as provided by said act, or that said Postmaster-General certified in writing that said acceptance was on said 14th day of December, 1897, or on any other day filed in the office of said Postmaster-General, or that at the time of said acceptance or filing, complainant was using or ever since or at any time has used any of its lines, particularly the lines described in said bill of complaint, which are within the corporate limits of said City of Pomona, for telegraphic purposes, or for sending or transmitting messages thereon by means of or through the means of telegraphic instruments, consisting of an ordinary key, relay or sounder or by means of the Morse signals.

And these respondents allege that said complainant is carrying on a local telephone business, and not a telegraph business, and in fact, as these respondents are informed and believe, and so allege, the said complainant is a telephone company, and that if the said complainant uses telegraph instruments in connection with its wires and in connection with its business, it is for the pur-
156 pose of sending messages on its own business and to its own employees and not otherwise.

III.

These respondents deny that the said complainant for a period of more than ten years prior to the first day of September, 1905, or at any other time, had constructed or was constructing, or had maintained or operated or conducted a business in the City of Pomona such as is described by it in its bill; on the contrary, these respondents allege that the business which the said complainant has carried on with the said City of Pomona, with the acquiescence and consent of the said City and the Board of Trustees thereof, was the business of constructing, maintaining and operating a telephone system and plant, with a central telephone exchange, and these respondents allege that said business was carried on, and the said plant constructed, maintained and operated under and by virtue of a franchise of the said City of Pomona granted to said complainant at its request, as will hereinafter be more fully alleged and set out and not otherwise, and these respondents deny that the said complainant has carried on any business in the City of Pomona, or has erected, maintained or operated any plant or appliances within the said city under or by virtue of the provisions of the said Act of Congress approved July 24, 1866; on the contrary, these respondents allege and state that the said complainant erected, maintained and operated its poles. arms and other apparatus and appli-
157 ances in, over and along the roads, streets and highways of the said City of Pomona under and by virtue of the franchise hereinafter particularly described, granted by the said City of Pomona in the year 1888, and not otherwise.

Respondents deny that the streets, roads, alleys or highways of the said City of Pomona at any time were or are now being used as open post-roads of the United States.

These respondents deny that the lines, poles, arms, insulators, wire or other apparati, fixtures or appliances erected and heretofore used by the said complainant in the roads, streets, alleys and highways in the said City of Pomona did not interfere with the use of the said streets, alleys and highways; on the contrary, these respondents allege that the said poles, wires, arms and other apparati constructed, erected, maintained and operated by the said complainant in and along the roads, streets, alleys and highways of the said City of Pomona, and particularly all of the said poles and other appliances used in connection with the local telephone exchange business in said City, do obstruct said streets, roads and alleys and constitute nuisances therein.

These respondents deny that complainant has always maintained or operated or that at the time of the filing of its said bill of complaint, it did maintain or operate, or that at any time since said date it has maintained or operated its said lines under or pursuant to law, or as it has or had the right to do; on the contrary, these respondents allege that ever since the expiration of the said
158 franchise hereinafter more particularly described, to wit, ever since the month of August, A. D. 1898, the said complainant has maintained and operated and is maintaining and operating its poles, lines, wires and telephone plant and system in and along the public roads, streets, alleys and highways in and of the said City of Pomona contrary to law and in violation of law, and in violation of the rights and privileges of the said City of Pomona and the inhabitants and citizens thereof.

These respondents deny that ever since the 14th day of December, 1897, or since any other date whatsoever complainant, pursuant to the terms of the said Act of Congress of July 24, 1866, or otherwise, or at all, has accepted or does now accept, or will continue to accept all or any telegrams between the several departments of the Government of the United States and their officers and agents tendered to it for transmission over all or any of its lines at rates annually fixed by the Postmaster-General of the United States or at all, or that the complainant ever since said 14th day of December, 1897, or at any other time, has given or does now give or will continue to give all or any such message or messages priority over all other business, or that it has on file in its office for the information of its various officers or agents, in the transmission or transaction of telegraph business for the Government of the United States, a schedule of rates entitled: "Schedule of Rates for Government Telegrams," issued by the Postmaster-General on August 5, 1904, or that annexed to said schedule issued by said Post-
159 master-General, is a list entitled: "Telegraph Companies which have accepted the conditions of the Act of July 24, 1866, and which are subject to the Provisions of the Order of the Postmaster-General fixing Government rates," or that the name of complainant appears in said list as set forth in said bill of complaint as follows: "125. The Sunset Telephone and Telegraph Company. John L. Sabin, President, San Francisco, Cal. Received and Filed December 14, 1897," or that complainant always has been

or now is ready or willing on application by any officer of the State of California or the United States, either in case of war, insurrection, riot or other civil commotion or resistance of public authority, for the prevention or punishment of crime, or for the arrest of persons suspected or charged therewith, to give to the communications of such officers immediate dispatch at the price of ordinary communications of the same length.

IV.

These respondents admit all the allegations contained in paragraph IV of said bill of complaint, except the last part of said paragraph IV, commencing with the word "that" on line 6, page 8, and ending with line 12, page 8, of said bill of complaint. These respondents admit that on said 30th day of August, 1905, a notice was served upon said respondent, S. C. Slanker, as Street Superintendent of the City of Pomona, by the president of said complainant company, but these respondents deny that said president
160 was empowered or authorized to serve said notice, or that said complainant authorized or instructed the service of said notice, or that said complainant had the right, power or authority to order or authorize the service of said notice on said Street Superintendent.

Your respondents, with reference to the matters and things alleged and set out in said paragraph IV, further allege that the true and only facts concerning said matters are as follows, to wit, and not otherwise:

Pursuant to a resolution of the Board of Trustees of said City of Pomona, passed June 6, 1905, E. S. Pillsbury of San Francisco, California, and Wm. E. Dunn, of Los Angeles, California, two of the attorneys for said complainant company, appeared before said Board of Trustees on July 19, 1905, in answer to said resolution passed June 6, 1905, and to show cause why said complainant company should not obtain a franchise for constructing, maintaining and operating its local telephone business within said City of Pomona, and then and there a debate and discussion as to the legal points involved was had between the said E. S. Pillsbury and said respondent R. G. Loucks, City Attorney, which debate and discussion was in the presence of said Board of Trustees in regular meeting assembled and lasted for two hours, and on August 1, 1905, said Board of Trustees duly passed its resolution of that date declaring the poles, wires and apparatus of said complainant a public nuisance and an obstruction on the streets of the said City of Pomona.

161 The said resolutions referred to herein of dates June 6, 1905, and August 1, 1905, are the same resolutions referred to in said paragraph IV of complainant's bill of complaint and annexed to said bill as Exhibits "1" and "3."

V.

These respondents deny that in order to conduct a telegraph business either by itself, or in connection with the telephone business

of complainant in the said City of Pomona, or to meet the demands of said city for telegraphic services, it has been necessary for complainant to erect, construct or maintain, or that it has erected, constructed or maintained any telegraph or telephone lines, or any lines whatsoever in any of the public streets, alleys or avenues of the said City of Pomona; on the contrary, these respondents allege that every pole and line erected by said complainant in or along any public street, alley or avenue in said city was erected by it and has been maintained and operated by it in connection with its telephone business and for the purpose of carrying on its telephone business and to meet the demands of the City of Pomona for telephone service and not otherwise, and that said complainant would not have erected and did not erect and would not have constructed and did not construct, and would not have maintained and did not maintain, any lines in said City of Pomona for the purpose of carrying on or conducting a telegraph business, or for the purpose of meeting any demands of the respondent, the said City of Pomona for
162 telegraphic services or the carrying of messages by telegraphic instruments, and these respondents deny that the said complainant has erected, constructed or maintained, or does now erect, construct or maintain any pole, arm, insulator, wire or other apparatus, fixture or appliance in any street, alley or avenue of said City of Pomona for the purpose of conducting a telegraph business either by itself or in connection with its telephone business, but that as hereinabove alleged and set out, the said parts and appliances were erected, constructed and maintained by said complainant for the purposes alone of a telephone business; and these respondents deny that the said complainant has ever constructed, operated or maintained any telegraph wires, poles or other apparatus by or with the consent or knowledge of the said City of Pomona or of its Board of Trustees, or in conformity with any rules or regulations of said city or of said board, or with the knowledge or consent of said city or of said board, or of any officer of said city, or at all.

VI.

Respondents deny that the complainant at the time of filing its bill of complaint, or at any other time, by or with the consent and acquiescence of said city of Pomona, operated or maintained, or that it has operated or maintained any telegraph system whatsoever in the said City of Pomona.

These respondents admit that up to the expiration of the franchise hereinbefore referred to and hereinafter more particularly described, the said complainant did operate, maintain and carry on a public telephone business in the said City of Pomona;
163 with the consent and acquiescence of said city, as expressed in and by the ordinance granting the said franchise, but not otherwise, and that ever since the expiration of the said franchise, the carrying on, conducting, maintaining and operating the said telephone business and of the different and several telephones and telephone lines in the said City of Pomona, by the said complainant, has been without the consent or acquiescence of the said

city or by any board or body authorized to give such consent or acquiescence, and has been without law and without right.

Respondents deny that each and all of the telephones described in paragraphh VI of said bill of complaint, is connected with the entire system of complainant.

These respondents allege that they are informed and believe, and on such information and belief allege the fact to be, that no messages are or can be transmitted from any point in the City of Pomona to any place within said city and particularly to any place in any state other than the State of California, by means of long distance wires owned or operated by the said complainant, and that the said complainant has not, during any time since 1898, owned, maintained, or operated any wires or other apparati by means of which long distance messages have been sent out of or into said City of Pomona.

These respondents deny that the action of the Board of Trustees of the said City of Pomona or of the said Superintendent of Streets, or other officer thereof, described in said bill of complaint,
164 or any action by said board or by said superintendent of streets, or by any member thereof, is or was an attempt to regulate commerce between the several States, or that the same is or was a violation of any of the provisions of Subdivision 3 of Section 8 of Article I of the Constitution of the United States, or of any other provision of said Constitution, or that the same is unlawful or void; and these respondents deny that the said telephone business of complainant conducted and carried on by it in the said City of Pomona, is or ever was an interstate business, and deny that the action of the said Board of Trustees is or was an unlawful or unwarranted interference with or an attempted regulation of said or any interstate business. Deny that the said action of said Board of Trustees is in violation of provisions of Subdivision 1 of Section 10 of Article I of the Constitution of the United States, or of any other provision thereof; and these respondents denly that within ten years next preceding the 6th day of June, 1905, complainant either by right or otherwise, except within and under the provisions of said franchise hereinabove referred to, and hereinafter more particularly described, has erected, placed, constructed, maintained or operated at any time its poles or lines of wire with the necessary arms, apparatus and fixtures or appliances used in connection therewith, over or along the streets, alleys, avenues or highways of said city (except the same was done prior to the month of August, 1898), except in violation of law and other right and without the consent or acquiescence of said City of Pomona or of its Board of
165 Trustees or of any other board officers of said city empowered by law to give acquiescence or consent.

And these respondents allege the fact to be that any work of construction or otherwise, or any expenditure of money made in the erection, construction, maintenance or operation of any poles, wires, apparatus, or appliances by the said complainants in the said City of Pomona, along any of its streets, avenues or alleys subsequent to the said month of August, 1898, was without right on the

part of said complainant, in violation of law and against the rights of the said City of Pomona and of the inhabitants and citizens thereof, and that ever since said month of August, 1898, the said complainant has and does now maintain, operate and construct public nuisances, in, along and over and across the said public streets, avenues and alleys of the said City of Pomona by means of and with the poles, arms, wires, apparatus and appliances described by the said complainant in its said bill of complaint, as having been erected, constructed, maintained and operated by it, over, along and across the said streets, avenues, and alleys, and that by means of the said poles, arms, wires, apparatus and appliances the said complainant ever since the said month of August, 1898, has maintained and is now maintaining public nuisances in, along, across and over the several public streets, avenues and alleys and highways of the said City of Pomona.

These respondents deny that any action or threatened action of the Board of Trustees alleged, described or set out in said bill of complaint and particularly the actions of said board referred
166 to in said paragraph VI of said bill, impairs the obligations of any contract, particularly of any contract entered into between the said City of Pomona and said complainant; and these respondents deny that there is now or at the time of the commencement of this action, or at any time since the month of August, 1898, there has been any contract whatsoever existing between the said City of Pomona and the said complainant; and deny that since the said month of August, 1898, the said complainant has had any contract or other rights in, over or across the streets, alleys or avenues of said city to erect, maintain or operate any telephone or telegraph system whatsoever.

These respondents deny that on or about the — day of ——, 1903, complainant had constructed or operated its telephone or telegraph system without any special franchise or privilege; on the contrary, these respondents allege that the said system (the same being a telephone system and not a telegraph system) was constructed, operated and maintained under a special franchise granted in the month of August, 1888, and expiring in the month of August, 1898, as hereinafter more particularly alleged and set forth.

These respondents admit that ever since before the year 1903, a controversy and contention has continuously existed and been carried on between the said complainant and the said City of Pomona as to the rights of the said complainant to maintain or operate or construct or build its telephone system in the said city, unless it applied for and procured a special franchise for so doing,
167 because of and for the reason of the fact that the special franchise theretofore owned by it had expired.

These respondents deny that in consideration of any act or concession or asquiescence or consent by or on behalf of the said City of Pomona, the said complainant removed any of its lines, poles or wires from off or along Second Street of the said city; on the contrary, these respondents allege that on the 25th day of February,

1903, the Board of Trustees of said city at a regular meeting of said board, and as a matter of police regulation, passed and adopted a Resolution of intention instructing the City Attorney of said city to prepare an ordinance for presentation to the said Board of Trustees for adoption by it at a subsequent meeting, wherein and whereby the poles, wires and lines along the paved portion of said Second Street were to be removed, and which said ordinance would affect all persons and corporations alike having wires, poles or arms along said paved portions of said Second Street. That immediately upon the adoption of said resolution of intention or instruction and the subsequent proceedings by said Board of Trustees and the Superintendent of Streets of said city, and without waiting for the said ordinance to be introduced or adopted, said complainant began the removal and removed the same to other streets and alleys of said City of Pomona.

And these respondents deny that the said complainant removed its poles or wires or any other part of its system under any agreement or contract of concession or consent whatsoever, or that it
168 agreed so to do in consideration of any concession, acquiescence or consent being given, extended or granted to it by the said City of Pomona or by the said Board of Trustees; and these respondents deny that any proposition of any kind or character with reference to the removal by the complainant of its poles and lines within the said paved portion of said Second Street was ever made by said complainant to said Board of Trustees of said city, or was ever accepted by the said Board. And deny that thereupon or under any such offer or acceptance, complainant removed its lines from the said paved portion of said Second Street, or from any other locality whatsoever, or that it rebuilt the same upon any other street or alley under any other proposition or offer made to the said Board of Trustees or accepted by the said Board.

Respondents deny that at any time under any contract or accepted proposition or otherwise prior to or since the 5th day of May, 1904, or prior to or since the 6th day of June, 1905, complainant has maintained or operated its telephone or telegraph system or telephone and telegraph system in said City of Pomona, and deny that it has either operated or maintained or constructed either a telegraph or telephone system or both in said City of Pomona, under any contract or agreement whatsoever with the said City of Pomona, or of any accepted proposition other than of said franhise of August, 1888.

Respondents deny that more than two years prior to June 1st, 1905, or at any other time said City of Pomona contracted and
169 agreed with complainant that if it would remove certain or any of its lines in said city or reconstruct the same at other places or at all, the said city would either recognize or admit the right in complainant to maintain or operate its telephone and telegraph system or telephone or telegraph system in said city or at all without any interference, let or hindrance or without being requested or compelled to apply for a franchise from said city for the conduct of said business, or that said complainant has kept or performed any agreement or condition on its part or that it had kept or fully

performed the same prior to May 5, 1904; and the respondents allege that neither the said City of Pomona nor the said Board of Trustees thereof, nor any members of said board, at any time had or has any right, power or authority whatsoever to grant or concede any such right or privileges as are claimed and set forth in that portion of paragraph six of said complaint, commencing with line 27, page 9, thereof, and ending with line 3 of page 13 thereof, being all of the last three pages and more of said paragraph six.

VII.

These respondents allege that they have not sufficient information, belief or knowledge to enable them to answer any of the allegations contained in paragraph VII of said bill, and therefore and basing their answer on such ground, respondents deny that during any of the times in said paragraph mentioned, complainant maintained or does now maintain a telegraph office in said city of Pomona, or that at any time or that it still is accustomed to receive telegraph messages from the residents of the City of Pomona, or to
170 transmit the same to persons in other places, either in the State of California or in the States of Oregon, Washington, Idaho or Nevada, or that it received or was accustomed to receive, or had received like messages in any of the aforesaid places, for transmission from or to be transmitted to residents of the City of Pomona or that it ever transmitted the same or delivered the same to such residents of said City of Pomona either in one continual service over its own line or in any other manner, or at all; or that in so sending or receiving or in so sending and receiving any such messages, the lines of complainant in the City of Pomona now constructed or hereafter to be constructed, are or will be necessary or used in sending or receiving the said or any telegraph messages, or that the same are or will be instrumentalities of interstate commerce, or that in the erection, construction or maintenance of all or any of the said lines, complainant cannot be compelled or required to obtain the permission of the said Board of Trustees of the said City of Pomona so to do, or that complainant is only required in that regard to comply with the reasonable regulations of the said City of Pomona to the height of its wires, condition of its poles or the like, so as not to interfere with the ordinary travel along, upon or in the streets, alleys, and avenues of said city, or that the complainant has heretofore done or that it will continue to do any or call of the said things.

VIII.

Respondents allege that they have not sufficient information, knowledge or belief to enable them to answer the allegations
171 contained in paragraph VIII of said bill of complaint, and for that reason and basing their answer on such grounds, these respondents deny that the complainant had or now has about 400 telephone subscribers in said city of Pomona, each of whom rents a telephone instrument from the above complainant which is connected with the telephone exchange in said city, or that each of

said subscribers had the right or privilege to telephone any telegraph message to be sent from the said City of Pomona by complainant to other offices of complainant in either the States of California, Oregon, Washington, Idaho or Nevada, and on such ground specially deny that the parties renting telephone instruments from complainant have any right or privilege to send any telegraph messages by means or through or with the use of said telephones or through or by or with the agency of said complainant or its telephone exchange, and denies that any such telegraph messages are taken down in the main office of complainant in the said City of Pomona and there transmitted over telegraph lines of complainant or that telegraph messages from points in any of said states to any such subscriber or subscribers are repeated to them by or through their telephones, or that the same constitutes a continuous service, or that each or all of said telephones of complainant in said City of Pomona have or has at any time been or that they are or will continue instruments for the transmission of Interstate Commerce or for the transmission of telegraphic messages or for the transmission of telephonic communications from residents in said City of Pomona to persons in
172 either of the States of Oregon, Washington, Idaho, or Nevada, by, through or over lines, instrumentalities, or apparatus of complainant of points or places within said States, or that in the course or any course of the transaction of its business complainant is accustomed to receive telegraphic messages sent from points outside of the State of California and within the United States to its subscribers at various places in the State of California including the said City of Pomona, or at its central exchange in said places, or to transmit the contents thereof to its subscribers by telephone in advance by delivering the written copies thereof, or that in many instances no written copies of such telegrams are delivered, subscribers accepting such messages as telephoned, or that subscribers of complainant in said City of Pomona ever received telegraphic messages in that manner or that they will continue so to receive them over all or any of the lines of complainant in said city and particularly over any of the lines mentioned in said bill of complaint which are alleged to have been interferred with or destroyed by the officials of said city. In that connection these respondents allege that they are informed and believe and on such information and belief allege that any telegraphic messages sent by, transmitted by or delivered by the said complainant to any person in the said City of Pomona has been in connection with its own business, and that in transmitting and delivering said telegraphic messages it was not doing the same for hire or pay or as a telegraph company, but for its own use, or on its own special business or service.

173 IX.

Respondents deny that complainant at the time of filing its said bill of complaint or at any time since the year 1898 has been ready or willing to abide by or perform any or all reasonable and proper and valid regulations and restrictions with the said Board of Trustees of the said City of Pomona and their successors may

impose or cause to be imposed on complainant in the construction, maintenance and operation of its said poles and lines or upon which its telephone business or telegraph business has been or may be conducted or carried on in its said City of Pomona; on the contrary, these respondents again allege and repeat that the said complainant is trying to maintain, operate and run a telephone business in said City of Pomona and to occupy the streets, alleys and avenues of said City of Pomona, with its poles, wires and other appliances without right and without any franchise whatsoever and against law, and these respondents in that connection further allege that the said City of Pomona, through its qualified officials, including its Board of Trustees, from time to time has offered the said complainant that if complainant would apply for a franchise, renewing its privileges, which it formerly had, that it, said city, would offer said franchise for sale, as provided by the laws of the State of California, and that it would at all times give to complainant an opportunity in conformity with the laws of the State of California of obtaining a franchise under *and* which it might operate, build, maintain and construct a telephone line, and if it so desired, telegraph lines in said city, but said complainant at
174 all times subsequent to the years 1902-3 has maintained its right to violate the law and maintained its right to operate and carry on a telephone business in said city, including the construction, erection and maintenance and operation of telephone poles and telephone lines in, along, over and across the streets, avenues and alleys of said city against the rights of said city and without any franchise whatsoever from said city and in violation of the laws of the State of California.

X.

Respondents, S. C. Slanker (wrongly sued herein as S. C. Slemker), and R. G. Loucks, for themselves specially answering the allegations contained in paragraph X of said bill of complaint, in so far as the same specially apply to them, deny that on the first day of August, 1905, or at any other time, they commenced the destruction of, or thereafter continued the destruction of any telephone lines of complainant in the said city of Pomona connecting the main telephone exchange of said city with any place outside of said city, or that they have already cut down or destroyed any poles or telephone lines in said city, except telephone poles or telephone lines in said city forming a part of the purely local telephone exchange business in said city, and that they have carefully refrained from cutting down or destroying or otherwise injuring any pole, line or wire over which long distance messages are or were being sent to or received by the telephone exchange from the said City of Pomona to or from places outside of said city, or that by
175 any possible construction could be held to be instruments over which interstate messages, either telephonic or telegraphic, could be or had been sent or received; and deny that they have cut down or destroyed or otherwise interfered with any pole

or line, appliance or apparatus belonging to the complainant, except such as form a part of what was heretofore its local telephone plant in the city of Pomona, used by it exclusively in connection with its central telephone exchange in its local telephone business over which messages by articulate speech were sent by one subscriber to another, and all of which said poles, wires and appliances were being maintained and were being operated by said complainant without right, in the city of Pomona, over, across, along and in the public streets, avenues and alleys of said city, and the same were public nuisances to be abated in accordance with the resolutions of the board of trustees of said city, and the same were by these respondents, as officers of said city, cut down and abated as and being public nuisances in the streets of said city, and on the orders and directions of the Board of Trustees of said city.

Deny that any line or pole destroyed, cute down or abated by these respondents on the first day of September, or at any other time, or which they intended to destroy and abate was or ever had been or would become an instrument used or to be used in the transaction of interstate commerce or interstate business. Deny that any act or threatened act on the part of any of the respondents answering by this answer, will cause complainant great or irreparable
176 injury or damage, and deny that any act committed or threatened to be committed by any of these respondents will interfere with the proper carrying on of any business of complainant with the Government of the United States and the several or any departments thereof, their officers or agents, and deny that the Government of the United States, or any of its departments, officers or agents, or the general public will be put to great or any inconvenience or loss through being deprived of the use of the telephone or telegraph system in the City of Pomona heretofore maintained, constructed and operated by complainant, and deny that the Government of the United States, or any of the departments thereof, their officers or agents or the general public will ever know that complainant is deprived or will be deprived of its power of sending telegraphic messages. And said respondents, Slanker and Loucks, still specially answering the allegations contained in said paragraph X of said bill of complaint, deny that any damage or injury has accrued or will accrue or result to complainant or to its business through its inability to properly handle telegraphic messages within or going to or coming from said City of Pomona.

XI.

Respondents allege that they have not sufficient knowledge, information or belief to enable them to answer any of the allegations contained in that part of paragraph X of said bill of complaint commencing with line 13, page 17 of said bill of complaint, and ending with line 20, page 18 of said bill, and therefore,
177 and basing their answer on such ground, respondents deny that prior to said first day of September, 1905, or at any other time, complainant had received or was accustomed to receive telegraph messages or telephone communications from persons out-

side of the State of California which were sent, or directed or delivered to the telephone subscribers of complainant in said City of Pomona over its lines in said city in the manner prescribed in said bill of complaint, or in any manner, or that during said time, complainant transmitted telegraphic messages or telephone communications which were received by it from its subscribers in said City of Pomona or delivered the same to parties outside of the State of California within the United States, or that all or any of the said messages or communications were delivered or transmitted wholly over the telephone or telegraph lines of complainant or over lines of complainant which were connected with other lines of complainant in the States of Oregon, Washington, Idaho or Nevada, or that all or any of such messages or communications were entirely transmitted or delivered through, upon or over the said lines of complainant, or that any interference with or destruction of the property of complainant by respondents Slanker and Loucks is in violation of or repugnant to the rights or privileges of the complainant under or pursuant to the constitution or laws of the United States, or of any subdivision or provision of said constitution or of any Act of Congress, and particularly of the Act of Congress approved
178 July 24, 1866, referred to in said bill of complaint, or that by reason of said or any interference or destruction by respondents Slanker and Loucks, or either, complainant has been deprived of any right or privilege to construct, maintain or operate lines of telegraph or telephone, along, over and across the public streets, avenues, and alleys or highways of the said City of Pomona to complainant's great or irreparable damage or loss, or at all. And respondents Slanker and Loucks deny that they are financially irresponsible and unable to respond in damages to complainant for any injuries which they have or may have inflicted or which they may threaten to inflict upon the property of complainant.

XII.

These respondents deny that this cause of action is a suit arising under the Constitution of the United States, or under any provision thereof, and particularly under Subdivision I, Section 10, Article I of said Constitution, or under Section I of Article XIV of the Amendments of said Constitution, or that this case is a suit or cause arising under the laws of the United States, particularly under the said act of Congress approved July 24, 1866, or the several amendments thereof. Deny that complainant has not a plain, speedy and adequate remedy at law in the premises.

XIII.

These answering respondents specially allege that in the month of August, 1888, the above-named complainant applied to the Board of Trustees of the said City of Pomona for a franchise in
179 accordance with the laws of the State of California, granting to said complainant the privilege of constructing, erecting, maintaining and operating a telephone system in said City of

Pomona over, along and across the public streets, avenues and alleys of said city. That thereupon the Board of Trustees of the said city, acting upon said application on the 8th day of August, 1888, regularly passed and adopted an ordinance of said city, being Ordinance No. 30 of the ordinances and laws of said city, wherein and whereby the said City of Pomona, by its said Board of Trustees, so acting, granted and gave to said complainant a franchise to build, construct, operate and maintain a public telephone system in the said city in accordance with the terms and provisions of said ordinance and as provided for therein over, across and along the public streets, avenues and alleys of said city, a copy of which said ordinance is hereto annexed, marked "Exhibit A" and is hereby made a part of this amended answer, the same as though fully copied into this paragraph.

That said complainant, under said franchise so granted to it and not otherwise, and not under any other claim or right whatsoever, went upon the public streets of said city and took possession of such parts thereof as were necessary or convenient to the erection, construction, operation and maintenance of its said telephone system, including poles, lines, cross-arms and other parts and appliances forming a part and parts thereof, and under said privileges
180 and franchise so granted to it, continued in such possession of the said parts of said streets. That said franchise, as recited in said ordinance, was for the term of ten (10) years from and after the date of approval thereof, viz: ten years from and after the 8th day of August, 1888, and the same expired by its terms and by operation of law on the 8th day of August, 1898. That said franchise has never been renewed or extended or in any manner enlarged or changed, but the same at all times was the only warrant or authority in law, in equity or in fact, to or for the said complainant erecting, constructing, maintaining, or operating any lines, poles, cross-bars, cross-beams, wires or other appliances or apparati in, on or over any of the streets, avenues or alleys of said city, in connection with its said telephone business, and said complainant has declined to ask for any further franchise or permission, but ever since the said 8th day of August, 1898, the said complainant has maintained, constructed and operated the said telephone system in said city, over, along, across and in the streets, avenues and alleys thereof, to the great annoyance of the said city and of the inhabitants thereof, and that the said complainant is now maintaining, constructing and operating along, over and across, in and through the streets, alleys and avenues of said city a large telephone system, consisting of numerous poles of many inches in diameter and several feet in height and of enormous metallic wire lines running from pole to pole and of cross-bars and of other instruments and appliances, each and all of which obstruct free, untrammeled use of the said streets, and the same are and at the time of
181 the filing of the bill of complaint herein were parts of the general telephone system, and together form and create a public nuisance and each part thereof in itself was and is a public nuisance in the streets of the said city.

XIV.

That on the 27th day of June, 1893, the Board of Trustees of said City of Pomona regularly approved, adopted and passed an ordinance of said city, being Ordinance No. 109, entitled, "An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful when Committed or Permitted within the Corporate Limits of the City of Pomona, and Providing Penalties therefor," of the ordinances of said city, a copy of which ordinance is hereto attached and marked "Exhibit B" and made a part of this amended answer, the same as though fully copied into this paragraph:

That continually and ever since said 27th day of June, 1893, and until the 7th day of July, 1903, said ordinance No. 109 was a valid, legal, and subsisting ordinance of said City of Pomona, at which said subsequent date it was repealed by Ordinance No. 245 of said city;

That on the 7th day of July, 1903, the Board of Trustees of said City of Pomona regularly approved, adopted and passed an ordinance of said city, being Ordinance No. 245, entitled "An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful when Committed or Permitted within the Corporate Limits of the City of Pomona,
182 and Providing Penalties therefor," of the Ordinances of said city, a copy of which ordinance is hereto attached and marked "Exhibit C" and made a part of this amended answer the same as though fully copied into this paragraph;

That continually and ever since said 7th day of July, 1903, the said Ordinance No. 245 has been and now is a valid, legal and subsisting ordinance of said City of Pomona;

That on the 22d day of May, 1889, the Board of Trustees of said City of Pomona regularly approved, adopted and passed an ordinance of said city, being Ordinance No. 49, entitled, "An Ordinance to Prevent Digging up or Excavating any Portion of any of the Streets of the City of Pomona without the Permission of the Superintendent of Streets, and Prescribing Rules for Laying Pipes in said Streets," of the ordinances of said city, a copy of which ordinance is hereto attached and marked "Exhibit D" and made a part of this amended answer the same as though fully copied into this paragraph.

That continually and ever since said 22d day of May, 1889, said Ordinance No. 49 has been and now is a valid, legal and subsisting ordinance of said city of Pomona.

Wherefore, these respondents pray the judgment of your Honors and of the above-entitled court in their favor and in the favor of each of them and against the above-named complainant;

1. That the said complainant take nothing whatsoever by its bill of complaint or by this action, and that it be denied relief, and be denied its costs, and that it be adjudged and decreed that said
183 complainant has come into this court asking equitable relief at the hands of this court against law and contrary to equity

and the rules and practices of the courts of equity of the United States.

2d. That it be adjudged and decreed that the said complainant has not now and that at the time of the filing of its bill of complaint it had not, and that at no time since the 8th day of August, 1898, has it had the right to maintain, construct, erect, build and operate any telephone or telegraph lines or system along, over, in or across any of the streets, alleys or avenues of said city, and at none of the said times it had the right to erect, construct or operate any telephone or telegraph lines or poles or any parts or appliances forming any part of the telephone system or telegraph system or telephone and telegraph system in, over, along or across any of the said streets, alleys or avenues of said city.

3d. That the said complainant be ordered at once and within a time to be fixed by this Honorable Court to remove from each and all of the streets, alleys and avenues of said City of Pomona, each and all of its poles, wires, cross-bars, lines and other parts and appliances now located and being operated and maintained by said complainant in, on and over said streets, alleys and avenues, and that unless within said time said complainant does so remove the same, that the same be abated in the manner provided by law and rules and practices of this court, and that the same then, at the expense and cost of the said complainant, be removed and destroyed by the proper officers of this court for that purpose by it
184 directed.

4. That it be adjudged and decreed that said complainant has no right whatsoever to erect, build, construct, maintain or operate either a telephone or telegraph or telephone and telegraph system consisting of wires, poles, cross-bars or other appliances in, over, on or across any street, alley or avenue of the said City of Pomona.

5. That these respondents and each of them do have such other, further and general relief at the hands of this court as to it may seem meet, equitable and proper in the premises, and for their costs.

ROBERT G. LOUCKS,
Solicitor for All the Above Answering Respondents and City Attorney of said City of Pomona.

Received copy of the above and foregoing amended answer, this 12th day of Dec., 1906.

PILLSBURY, MADISON & SUTRO.
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER.
WILLOUGHBY RODMAN.

EXHIBIT "A" [TO AMENDED ANSWER]—ORDINANCE No. 30.

An Ordinance of the City of Pomona Granting to the Sunset Telephone-Telegraph Company (a Corporation) the Right to Erect Poles and Telephone Wires Along the Public Streets of Said City for a Period of Ten Years.

185 The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. The Sunset Telephone Telegraph Company is hereby granted, for the period of ten years from date of passage and approval of this ordinance, the right, and are hereby authorized, to erect and maintain telephone poles and to run wires thereon over and along the public streets and thoroughfares of said city, subject to the provisions, limitations and restriction, and on the conditions hereinafter contained.

SEC. 2. Poles to be erected for the purpose mentioned in the preceding section shall be placed from one hundred and fifty to one hundred and eighty feet apart, but shall not be so placed as to in any manner obstruct or interfere with the free use of any street, alley, or driveway in said city. The outer face of all poles shall be placed within and adjoining the curb.

SEC. 3. Telephone wires shall in all cases be suspended at a distance of at least nineteen feet from the ground, and maintained at that or a greater altitude at all points where wires are placed.

SEC. 4. In case it shall at any time become necessary, in order to extinguish or prevent fire, or to protect property against loss or injury by fire in said city, to remove any of the poles or wires mentioned in the foregoing sections of this ordinance, the same may be removed by or under the direction of the fire department of said city, and such poles and wires shall be replaced and repaired by said corporation in its discretion, but at its own expense, and

186 no charge shall ever be made against, nor claim allowed or paid by said city for any injury to such poles or wires necessarily caused by said fire department, as aforesaid.

SEC. 5. This ordinance is passed and the franchise hereby provided for is granted on the further condition that said city, whenever, in the discretion of its Board of Trustees it shall elect so to do, shall have the right to use such telephone poles for the purpose of suspending thereon or attaching thereto fire alarm wires, at such reasonable, convenient, and practicable point or place of such poles as may be designated by the grantees, provided that such fire alarm wires shall be placed in position by or under the direction or supervision of said Telephone Telegraph Company.

SEC. 6. No private residence, building, or structure in said city shall be used by said Telephone-Telegraph Company for the purpose of suspending or supporting any of its telephone wires in said city without permission of the owner of such residence, building, or structure.

SEC. 7. This ordinance shall take effect and be in force from and after the date of its publication.

Approved this eighth day of August, 1888.

CHARLES FRENCH,
President of the Board of Trustees.

Attest:

ARZA CRABB,
City Clerk.

187 EXHIBIT "B" [to AMENDED ANSWER]—ORDINANCE No. 109.

An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful When Committed or Permitted Within the Corporate Limits of the City of Pomona, and Providing Penalties Therefor.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. It shall be unlawful for any person to fire any gun or pistol, or to run any horserace, either for a wager or for amusement, or to ride or drive any horse or other animal in a reckless manner, within the following limits in the City of Pomona, viz., between the east line of Gibbs Street and west line of Rebecca Street, the north line of Holt Avenue, and south line of Seventh Street.

SEC. 2. It shall be unlawful for any person to molest, interfere, or tamper with any of the fire plugs of the City of Pomona, or to give any false alarm of fire by shouting or otherwise, or by ringing the fire bell of said city.

SEC. 3. It shall be unlawful for any person to deface any building, tree, sidewalk, or curbing within the city of Pomona, by writing, printing, pasting, or posting thereon, any name, word, sign, or advertisement of any description.

188 SEC. 4. It shall be unlawful for any person to sleep on any of the sidewalks of the City of Pomona, or in any dwelling, barn, outhouse, or other building in said city, without the permission of the owner, agent, or lessee thereof; or for any person to be or appear on any public street, alley, or other public place in said city, in a state of intoxication.

SEC. 5. It shall be unlawful for the owner or keeper of any room or place in the City of Pomona in which billiards, pool, tenpins, or other games are usually played, to play or permit any of such games to be played therein at any time between the hours of 11 o'clock P. M. on Saturday and 5 o'clock A. M. on the following Monday; or at any time on any other day of the week between the hours of 11 o'clock P. M. and 5 o'clock A. M. of the following day.

SEC. 6. It shall be unlawful for any person, hauling any wood, hay, or grain, in or into the City of Pomona, in any wagon or other vehicle, for barter or sale, to suffer or permit the same to stand or remain for any time on Second Street, between Gibbs and Parcels, while such wood, hay, or grain is being bartered, sold, or offered for sale.

SEC. 7. It shall be unlawful for any person to engage in the playing of ball on any street or in any public place in the city of Pomona, within the limits specified in Section 1 of this ordinance

SEC. 8. It shall be unlawful for any minor child, under the age of eighteen years, to loiter around any railroad depot in the City of Pomona, without the consent of the owner, agent, or person in charge thereof, or to get on or off any railroad car,
189 street-car, engine, handcar, truck or other vehicle, while the same is in motion, or at any time, without the permission of the owner, agent, or person in charge of the same.

SEC. 9. It shall be unlawful for any person, firm, or corporation owning or controlling any street-car, dray, or express wagon, to suffer or permit the same to stand on Second Street, between Garey Avenue and Ellen Street, in front of any business house or place. Provided that this section shall not apply to dray or express wagons while in actual use in receiving or delivering goods.

SEC. 10. It shall be unlawful for any person to kill any bird, except linnets, or to gather or destroy their eggs or nests within the following limits in the City of Pomona: Between the north line of San Bernardino Avenue and the south line of Crow Avenue, the east line of Town Avenue and the west line of Hamilton Avenue.

SEC. 11. It shall be unlawful for any minor child under the age of sixteen years to smoke cigarettes in the city of Pomona.

SEC. 12. It shall be unlawful for any person to place any obstruction of any kind in any public street or on any sidewalk in the City of Pomona, or to authorize, procure, or permit any obstruction to be placed therein or thereon. Each day any such obstruction is maintained or permitted in any such street or on any such sidewalk shall be deemed a separate offense. Provided that this section shall
190 not apply to the temporary obstruction of streets by buildings while the same are being moved from one place to another.

SEC. 13. Any of the acts and things in this ordinance prohibited, when committed or permitted in the City of Pomona, shall be deemed, and is hereby declared to be, a public nuisance.

SEC. 14. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the city jail of the City of Pomona for a term not exceeding sixty days, or by both such fine and imprisonment. Provided that any judgment that the defendant pay a fine shall also direct that in default of such payment he shall be imprisoned in the city jail of the City of Pomona until such fine is satisfied in proportion of one day's imprisonment for every two dollars of the fine.

SEC. 15. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

SEC. 16. This ordinance shall take effect and be in force from and after its passage and publication according to law. Provided, that nothing herein contained shall apply to the trial of persons charged with offenses committed prior to the taking effect of this

ordinance. In such cases the trial shall be had and the
191 punishment shall be fixed in accordance with the ordinances heretofore existing.

Introduced June 13, 1893.

Approved and adopted June 27, 1893.

J. A. GALLUP,
President of the Board of Trustees.

Attest:

J. R. GARTHSIDE,
City Clerk.

EXHIBIT "C" [TO AMENDED COMPLAINT]—ORDINANCE NO. 245

An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful When Committed or Permitted Within the Corporate Limits of the City of Pomona, and Providing Penalties therefor.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. It shall be unlawful for any person, not a peace officer, to wear or carry concealed upon or about his person, any firearm, pistol, revolver, dirk, bowie knife, stiletto; slung-shot, sand-club or metallic knuckles, or to discharge or fire any gun or pistol in the City of Pomona, except he first have a written permission so to do, signed by the city marshal. Provided, that should the city marshal refuse to grant a permit to any person who may apply therefor, such person may apply to the Board of Trustees for such
192 permit, who shall have power to grant the same in their discretion.

SEC. 2. It shall be unlawful for any person to engage in the playing of ball on any street or in any public place in the City of Pomona.

SEC. 3. It shall be unlawful for any person to kill any bird, except linnets, or to gather or destroy any eggs or nests in the City of Pomona.

SEC. 4. It shall be unlawful for any minor child under the age of sixteen years to smoke cigarettes in the City of Pomona.

SEC. 5. It shall be unlawful for any person to molest, interfere, or tamper with any of the fire plugs of the City of Pomona, or to give any false alarm of fire by shouting or otherwise, or by ringing the fire bell of said city.

SEC. 6. It shall be unlawful for any person to deface any building, tree, sidewalk, or curbing within the City of Pomona, by writing, printing, pasting, or posting thereon, any name, word, sign, or advertisement of any description, or to hand out, distribute, throw any waste paper, posters, or advertisements of any kind on any of the sidewalks or streets of said city.

SEC. 7. It shall be unlawful for any person hauling any wood, hay, or grain, in or into the City of Pomono, in any wagon or other vehicle, for barter or sale, to suffer or permit the same to stand or

remain for any time on Second Street, between Louisa Street and Parcels Street, while such wood, hay, or grain is being bartered, sold, or offered for sale.

193 SEC. 8. It shall be unlawful for any person, firm, or corporation owning or controlling any street-car, dray, wagon, buggy, carriage, or express wagon, to suffer or permit the same to stand on Second Street, between Louisa Street and Parcels street. Provided that this section shall not apply to dray or express wagons while in actual use receiving or delivering goods.

SEC. 9. It shall be unlawful for any person to sleep on any of the sidewalks, or in the public parks or other public places, in the City of Pomona, or in any dwelling, barn, outhouse, or other building in said city, without the permission of the owner, agent, or lessee thereof; or for any person to be or appear on any public street, alley or other public place in said city, in a state of intoxication.

SEC. 10. It shall be unlawful for any minor child, under the age of eighteen years, to loiter around any railroad depot in the City of Pomona, without the consent of the owner, agent or person in charge thereof, or to get on or off any railroad car, street-car, engine, handcar, truck or other vehicle, while the same is in motion or at any time without permission of the owner, agent or person in charge of the same.

SEC. 11. It shall be unlawful for the owner or keeper of any room or place in the City of Pomona, in which billiards, pool, tenpins, or other games are usually played, to play or permit any of such games to be played therein at any time between the hours of 11 o'clock P. M. on Saturday and 5.00 o'clock A. M. on the following

194 Monday; or at any time on any other day of the week between the hours of 11 o'clock P. M. and 5:00 o'clock A. M. of the following day.

SEC. 12. It shall be unlawful for any person to run any horse-race, bicycle or automobile race, either for a wager or for amusement, or to ride or drive any horse or other animal; or to ride, drive, or propel any bicycle or automobile or any other vehicle in a fast or reckless manner in the City of Pomona.

SEC. 13. It shall be unlawful for any person to place any obstruction of any kind in any public street or on any sidewalk in the City of Pomona, or to authorize, procure, or permit any obstruction to be placed therein or thereon. Each day any such obstruction is maintained or permitted in any such street or on any such sidewalk shall be deemed a separate offense. Provided, that merchants for the display of goods, wares and merchandise may occupy a space three feet in width on the inside of sidewalk adjacent to the building; and that merchants and others receiving and delivering goods shall be allowed twelve hours from the time such goods are deposited on the sidewalk until they are removed, provided that a space five feet in width shall at all times be kept clear for accommodation of persons passing; and provided further, that this section shall not apply to the temporary obstruction of streets by buildings while the same are being moved from one place to another.

SEC. 14. Any of the acts and things in this ordinance prohibited

when committed or permitted in the City of Pomona
195 shall be deemed, and is hereby declared to be, a public nuisance.

SEC. 15. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the city jail of the City of Pomona, for a term not exceeding sixty days, or by both such fine and imprisonment. Provided, that any judgment that the defendant pay a fine shall also direct that in default of such payment he shall be imprisoned in the city jail of the City of Pomona until such fine is satisfied in proportion of one day's imprisonment for every two dollars of the fine.

SEC. 16. Ordinance No. 109 and all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

SEC. 17. This ordinance shall take effect and be in force from and after its passage and publication according to law. Provided, that nothing herein contained shall apply to the trial of persons charged with offenses committed prior to the taking effect of this ordinance. In such cases the trial shall be had and the punishment shall be fixed in accordance with the ordinances heretofore existing.

SEC. 18. The City Clerk shall certify to the passage of this ordinance, and shall cause the same to be publisned once in "The Pomona Review," and thereupon and thereafter it shall take
196 effect and be in force.

Approved this 7th day of July, 1903.

W. H. POSTON,
President of the Board of Trustees of the City of Pomona.

Attest:

A. N. HARRIS,
City Clerk of the City of Pomona,
Per T. R. TROTTER,
Deputy.

I hereby certify that the foregoing ordinance was introduced on the 7th day of July, 1903, and was passed by the Board of Trustees of the City of Pomona and signed by its President at a regular meeting of said Board, held on the 4th day of August, 1903, by the following vote:

Ayes—Trustees, Campbell, Douglass, Lobingier, Miller, Poston.
Noes—Trustees, none.
Absent—Trustee, none.

A. N. HARRIS,
City Clerk of the City of Pomona,
Per T. R. TROTTER, *Deputy.*

197 EXHIBIT "D" [TO AMENDED ANSWER]—ORDINANCE No. 49.

An Ordinance to prevent digging up or excavating any portion of any of the streets of the City of Pomona without the permission of the Superintendent of Streets, and prescribing rules for laying pipes in said streets.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. It shall be unlawful for any person at any time without the consent in writing of the superintendent of streets of the City of Pomona, first had and obtained, to excavate or dig up any portion of any street or alley, in said city, for any purpose whatever. And whenever any person shall excavate or dig up any portion of any such street or alley, under permission, granted or otherwise, no part of such excavation shall be permitted to remain open longer than five days after such excavation was made; but the same shall be filled up, and the streets, sidewalks, alley curb, or either, wherein such excavation was made, shall be fully and in every respect restored to its former condition by the person making such excavation, and the same so far as affected by such excavation shall be maintained in good repair for thirty days after such excavation shall have been filled up.

198 Provided that nothing herein contained shall apply to any work done in or upon any of the said streets or alleys by said city.

SEC. 2. Whenever any pipe for conducting water or gas among any of the public streets of said city shall be laid by any person, company, or corporation, the same shall be laid as follows, viz.: All water pipes shall be laid at a depth of not less than thirty inches below the surface of the street according to the established grade thereof, and in streets one hundred feet wide or over, shall be laid not less than twenty-four feet nor more than thirty feet from the center line of such street, and all gas pipes shall be laid at a depth of not less than two feet below the surface of the street according to such established grade, and in streets one hundred feet wide or over, shall be laid not less than twenty feet and not more than twenty-four feet from such center line.

In streets less than one hundred feet wide and not less than seventy feet wide, such water pipes shall be laid not less than fifteen feet nor more than nineteen feet from the center line of street, and gas pipes thereon shall be laid not less than thirteen feet nor more than fourteen feet from such center line.

In all streets less than seventy feet wide, all water pipes and gas pipes shall be laid not less than eighteen feet from the center line of street, and shall be at least twelve feet from property line.

Provided that in case any of said pipes shall be laid in any street for which no grade shall have been established prior to the laying of such pipes, water pipes shall be laid at least thirty inches below

the natural surface of the street, and gas pipe shall be laid
199 at least two feet below such surface, and provided further that there shall be a service cock or cut-off on all service pipes connecting with gas and water mains, which shall be placed inside of the curbing front of premises to be supplied, and not more than six inches distant from the inner line of such curb.

SEC. 3. It shall be the duty of all persons who shall make or cause to be made any excavations in any of the streets or alleys of said city, or who in the prosecution of any work or improvements allowed by law therein shall cause any obstruction to the free use thereof, as a public way, to cause to be placed and maintained at such excavation, or other obstruction, during the night-time, a signal light sufficient to give timely warning to persons passing along such street or alley, of the existence and location of such excavation or obstruction.

SEC. 4. Any person who shall violate any of the provisions of this ordinance, or who shall fail or neglect to comply with the requirements thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than ten dollars nor more than two hundred dollars or by imprisonment for a term not exceeding ten days, or by both such fine and imprisonment.

SEC. 5. Ordinance No. 19 of said city, entitled "An Ordinance to Prevent Digging up or Excavating Any Portion of Any of the Streets of the City of Pomona Without the Permission of the Superintendent of Streets, and Prescribing Rules for Laying Pipes in Said
200 Streets," approved March 28, 1888, is hereby repealed.

SEC. 6. This ordinance shall take effect and be in force from and after its passage and publication according to law.

Introduced May 15, 1889.

Approved and adopted May 22, 1889.

W. M. WOODY,
President of the Board of Trustees.

Attest:

ARZA CRABB,
City Clerk.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern Dist. of Cal., Southern Division. Sunset Telephone and Telegraph Co., Complainant, vs. City of Pomona, et al., Rspdts. Amended Answer. Filed Dec. 1, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 and 3 Union Blk., Pomona, Cal., Atty. for Rspdts.

201 [*Exceptions to Amended Answer for Impertinence.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) et al., Respondents.

Exceptions for impertinence taken by the complainant to the amended answer of the respondents, City of Pomona, Mel Campbell, N. W. Miller, L. R. Matthews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of the Streets in and for the said City of Pomona, R. G. Loucks, as City Attorney of said City of Pomona, and S. C. Slanker and R. G. Loucks.

Now comes the complainant in the above-entitled cause, and takes the following exceptions for impertinence to the amended answer of the above-named respondents to the Bill in Equity filed in this cause by the complainant therein, and describes the following as the particular passages in the said amended answer hereby objected
202 to as containing impertinent matter:

First Exception. For that the following part of paragraph XIV of said amended answer is impertinent, to-wit:

Beginning with the words "That on the 27th day of June, 1893," in line 2 of page 29 thereof, and ending with the words "by Ordinance No. 245 of said city," in line 17, of page 29 thereof.

Second Exception. For that the following part of paragraph XIV of said amended answer is impertinent, to-wit: Beginning with the words "That on the 7th day of July, 1903," in line 18 of page 29 thereof, and ending with the words "said City of Pomona" in line 1 of page 30 thereof.

Third Exception. For that the following part of paragraph XIV of said amended answer is impertinent to wit: Beginning with the words "That on the 22d day of May, 1889," in line 2 of page 30 thereof, and ending with the words "subsisting ordinance of said City of Pomona," in line 15 of page 30 thereof.

In which particulars this exceptant excepts to the said amended answer as impertinent, and prays that the said impertinent matter may be expunged therefrom.

Dated San Francisco, January 3d, 1907.

PILLSBURY, MADISON & SUTRO,
Solicitors for Complainant.

BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Of Counsel.

203 [Endorsed:] No. 1209. Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation, et al., Respondents. Exceptions to Amended Answer for Impertinence. Received copy of the within exceptions, this 5th day of January, 1907. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 7, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco.

[*Report of Special Master on Exceptions to Amended Answer for Impertinence.*]

In the Circuit Court of the United States, Ninth Circuit, in and for the Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY, Complainant,
vs.
CITY OF POMONA et al., Defendants.

To the Honorable Judges of the Circuit Court of the United States, Southern District of California, in Chancery Sitting:

In pursuance of an order of reference of this Honorable Court made in the above-entitled cause, and dated the 12th day of January, 1907, I, the subscriber appointed by said order Special
204 Master for this purpose, do respectfully report:

That I have been attended by counsel for complainant and for defendants and have examined the exceptions of the complainant for impertinence to the amended answer of the said defendants, and, having considered the same, do report:

That exception 1st to the passage in said amended answer, lines 1 to 17, both inclusive, of page 29, as follows:

"That on the 27th day of June, 1893, the Board of Trustees of said City of Pomona regularly approved, adopted and passed an ordinance of said city, being ordinance No. 109, entitled, 'An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful when Committed or Permitted within the Corporate Limits of the City of Pomona, and Providing Penalties therefor,' of the ordinances of said city, a copy of which ordinance is hereto attached and marked Exhibit 'B,' and made a part of this amended answer, the same as though fully copied into this paragraph;

That continually and ever since said 27th day of June, 1893, and until the 7th day of July, 1903, said Ordinance No. 109 was a valid, legal, and subsisting ordinance of said City of Pomona, at which said subsequent date it was repealed by Ordinance No. 245 of said City";

—for impertinence should be sustained. The matter set forth in said

amended answer to which said exception is directed is not responsive to any allegation of the complaint and would have no place
205 in the answer except upon the theory of the defendant that the maintenance of the telephone system of the complainant, in the streets, alleys, and avenues of the said defendant, the City of Pomona, created a public nuisance and was and is a public nuisance in the streets of said city as disclosed in the concluding allegations of the defendant's amended answer on page 28 thereof, and that it might be necessary for the defendants to introduce in evidence and therefore necessary to plead the matters set forth in the foregoing allegations of the amended answer to which the said exception has been filed. The objection to this, however, made by the complainant must be sustained for the reason that said ordinance set forth in said amended answer and known as Ordinance No. 109 entitled: "An Ordinance for the Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful when committed or permitted within the corporate limits of the city of Pomona and providing penalties therefor," was as appears by said answer repealed on the 7th day of July, 1903, and thereafter, either as to a pre-existing violation thereof, or for the purpose of establishing that any matters herein mentioned were public nuisances, was of no effect whatsoever. No punishment could be thereafter imposed for any violation thereof, and being repealed such an ordinance had no effect in declaring what was a public nuisance.

U. S. v. Yeaton, 5 Cranch, 281;
U. S. v. Passmore, 4 Dall. 372; Fed. Cases 16,005;
26 Am. & English Enc. 755.

206 This ordinance, therefore, can be of no effect as declaring what is a nuisance within the City of Pomona nor as affecting in any way any of the rights of the complainant. For this reason I am of the opinion that this exception for impertinence should — sustained.

The second exception to the passage in said amended answer, lines 18 to 30 of page 29, and line 1 of page 30, as follows:

"That on the 7th day of July, 1903, the Board of Trustees, of said City of Pomona regularly approved, adopted and passed an ordinance of said city, being Ordinance No. 245, entitled, 'An ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful when Committed or Permitted within the Corporate Limits of the City of Pomona, and Providing Penalties therefor,' of the ordinances of said city, a copy of which ordinance is hereto attached and marked Exhibit 'C' and made a part of this amended answer the same as though fully copied into this paragraph;

That continually and ever since said 7th day of July, 1903, the said ordinance No. 245 has been and now is a valid, legal and subsisting ordinance of said City of Pomona";

—for impertinence should be overruled. The objection made to this ordinance, that it was approved and introduced upon the same day, as it is claimed is shown by Exhibit "C" attached to the complaint

and made — thereof, in violation of section 763 of the act of the legislature of the State of California, entitled "An Act to provide for the organization, incorporation and government of municipal corporations," Statutes of California, 1883, page 93, which provides that no resolution granting any franchise and no ordinance for any purpose should be passed by the Board of Trustees on the day of its introduction nor within five days thereof, s not sustained by a further examination of the exhibit referred to. It appears on the printed copy of the ordinance attached as Exhibit "C" aforesaid, that it was approved on the 7th day of July, 1903 but the certificate of the clerk thereto attached is "that the foregoing ordinance was introduced on the 7th of July, 1903, and was passed by the Board of Trustees of the City of Pomona and signed by its President at a regular meeting of said Board. held on the 4th day of August, 1903," and therefore, so far as the introduction and passage and adoption thereof, they were in accordance with the statute above referred to.

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While the ordinance does not appear to be responsive to any allegations of the complainant's complaint, nevertheless the theory of the defendants is, as disclosed by the concluding portion of their amended answer on page 28 thereof, that the complainant in maintaining and operating along, over and across, in and through the streets, alleys, and avenues of said city, its telephone system consisting of numerous poles of many inches in diameter and several feet in height, is maintaining and creating a public nuisance and the same is a public nuisance in the streets of said city. Apparently for no other purpose than for the purpose of being able to show in evidence what has been declared by the Board of Trustees of the City of Pomona to be a public nuisance in said city, the defendants have therefore introduced into the amended answer and plead the ordinance last above referred to.

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I am in doubt whether such ordinance can in any way be said to refer to matters in question, but in addition thereto, grave questions are raised by the complainant's counsel as to the applicability in any wise of this ordinance to the present controversy as a declaration by the public authorities of the City of Pomona of what is a nuisance. It is contended by the counsel for the complainant that it does not apply to telegraph companies for the reason that it having been provided by law by section 536 of the Civil Code of the State of California that telegraph corporations may construct lines of telegraph along and upon any public road or highway and may erect poles, posts, piers or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, and the Act of Congress of July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the Use of the Same for Postal, Military and Other Purposes," having given the right to telegraph companies to the use of public roads and highways as open post-roads, that therefore the telegraph lines of the company being maintained thereunder and by the express authority of such laws and statutes, cannot be deemed to be a nuisance, Civil Code, section 3482.

In reply to this counsel for defendants asserts that com-
209 plainant is not operating under and by virtue of the Act of Congress of July 24th, 1866, above referred to in the City of Pomona, and that so far as telegraph corporations are granted permission to construct lines and telegraphs along and upon any public road or highway by virtue of section 536 of the Civil Code, that said section of the Civil Code is repealed by virtue of the Act of the Legislature of the State of California, approved March 22d, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts." Statutes of California, 1905, page 777.

This contention presents one of the main questions to be decided in this case and in some respects the most important and raises the question as to whether or not under the Act of March 22d, 1905, the complainant is bound to secure a franchise from the City of Pomona under that Act in order to maintain and operate its telephone and telegraph system in said city.

Such a question should not be decided upon an exception for impertinence but should rather be determined upon the final hearing of the case. It is not a matter of easy determination; and the rule as I understand it is, that "exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant or is stated with needless prolixity. If it may be material, the exception will not be allowed as that would leave the defendant without remedy, but the allegations excepted to,
210 will be allowed to remain in the answer and the effect thereof if found to be true, determined upon the final hearing."

1 Deady, 108, s. c. 5th Fed. Cas. No. 2607.

"Nor will the Court in cases of alleged impertinence, order the matter alleged to be impertinent, to be struck out, unless in cases where the impertinence is very fully and clearly made out; for if it is erroneously struck out, the error is irremediable; but if it is struck out the court may set the matter right in point of costs."

Story Equity Pleadings, sec. 267.

If the ordinance in question declaring certain violations thereof to be misdemeanors and public nuisances is not in violation of other provisions of the Code and Statutes of the State of California, it may be a matter of defense for the defendant in enabling it to show what has been determined by the authorities of the City of Pomona to be a public nuisance, and it should therefore be allowed to remain in order that it may be introduced in evidence and the Court may determine the effect of or the validity thereof. It does not appear to my mind that if it remains in the answer that it will be in any way a serious cost or expense to the complainant, and if it is, the Court may set the matter right in point of costs at the hearing.

The third exception to the passage in said amended answer, lines 2 to 15, page 30 thereof, as follows:

"That on the 22d day of May, 1889, the Board of Trustees of said City of Pomona regularly approved, adopted and passed an ordinance of said city, being Ordinance No. 49, entitled 'An
211 Ordinance to Prevent Digging up or Excavating any Portion of any of the Streets of the City of Pomona without the Permission of the Superintendent of Streets, and Prescribing Rule for Laying Pipes in said Street,' of the ordinances of said city, a copy of which ordinance is hereto attached and marked Exhibit 'D' and made a part of this amended answer the same as though fully copied into this paragraph.

That continually and ever since said 22d day of May 1889, said Ordinance No. 49 had been and now is a valid, legal and subsisting ordinance of said city of Pomona";

—for impertinence should be sustained. While it may be, that because the matter above set forth is new matter and not responsive to the bill and as setting up an insufficient defense, it is not the proper subject of an exception for impertinence (Adams vs. Bridgewater I. Co., 6 Fed. R. 179; Bower-Barff R. I. Co. vs. Wells R. I. Co., 43 Fed. R. 391); nevertheless it appears to me that this matter set up in this portion of the amended answer is wholly irrelevant. The ordinance therein referred to, either in its title or its subject matter, does not appear to have had any reference to the acts of the complainant. The ordinance evidently was only intended for the purpose of covering, digging and excavating of the streets for the purpose of laying pipes therein, and I cannot see it is applicable in any way to the questions involved in this case. It does not cover any of the matters which the complainant alleges a right to do or maintain, nor does it cover any matters which the defendants allege in
212 their answer that the complainant has done as in any wise maintaining thereby a nuisance in the streets of the city of Pomona.

My conclusions therefore upon this reference are as hereinabove set forth.

Respectfully submitted,

LYNN HELM,
Special Master.

[Endorsed:] No. 1209. In the Circuit Court of the United States, Ninth Circuit, Southern District of California. Sunset Telephone & Telegraph Company, Complainant, vs. City of Pomona, et al., Defendants. Master's Report. Filed Feb. 18, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Lynn Helm, Attorney for ——, Los Angeles, California.

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) et al., Respondents.

213 *Exceptions of Defendants to Report of Special Master on Amended Answer.*

To the Honorable Judges of the Circuit Court of the United States, Southern District of California, Southern Division, in Chancery Sitting:

Come now the defendants in the above-entitled case and except to the report of Lynn Helm, Special Master, filed herein on the 18th day of February, 1907, and to each and every part thereof sustaining the exceptions of complainant herein for impertinence, and striking out parts of defendants' amended answer herein, and that said Special Master erred particularly in the following specified portions of his said report, and that said defendants except to the ruling of said Special Master made in and under the following portions of his said report as follows, to wit:

1. That portion of his said report sustaining First Exception of complainant to the passage of said amended answer, lines 1 to 17, both inclusive, of page 29 thereof.

2. That portion of his said report sustaining Third Excepiton of complainant to the passage of said amended answer, lines 2 to 15, page 30 thereof.

ROBERT G. LOUCKS,
Solicitor for Respondents.

February 19th, 1907.

Received copy of the within exceptions this 19th day of February, 1907.

PILLSBURY, MADISON AND SUTRO,
BICKNELL, GIBSON, TRASK, DUNN &
CRUTCHER AND
WILLOUGHBY RODMAN,
By I. J. A.

214 [Endorsed:] No. 1209. In the Circuit Court of the U. S., 9th Circuit. Southern Dist. of Cal. Sunset Tel. & Tel. Co., Complt., vs. City of Pomona, et al., Rspdts. Exceptions to Report of Special Master on Amended Answer. Filed Feb. 21, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, 435 Stimson Bldg., Los Angeles, Cal., Atty. for Rspdts.

[*Order Denying Motion to File Supplemental Answer, Affirming Report of Master, etc.*]

At a stated term, to wit, the January Term, A. D. 1907, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, held at the courtroom, in the City of Los Angeles, on Monday, the eleventh day of March, in the year of our Lord one thousand nine hundred and seven.

Present: The Honorable Olin Wellborn, District Judge.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) et al., Defendants.

This cause coming on this day to be heard on the motion of defendants for leave to file a supplemental answer herein, and
215 also to be heard upon the exceptions taken by defendants to the report of Lynn Helm, Special Master, filed herein on the 18th day of February, 1907; Willoughby Rodman, Esq., appearing as counsel for complainant and Robert G. Loucks, Esq., appearing as counsel for defendants, and said exceptions having been argued by counsel for the respective parties; it is now by the Court ordered that said motion for leave to file a supplemental answer herein be, and the same hereby is denied. It is further ordered by the Court that the report of the Special Master be, and the same hereby is affirmed in all respects, except as to the first exception, and that said first exception be allowed; to which rulings of the Court denying the motion for leave to file supplemental answer, and affirming the report of the Special Master, defendants by their counsel Robert G. Loucks, Esq., note and are allowed an exception, which is hereby entered herein.

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) et al., Respondents.

216 *Replication.*

The replication of Sunset Telephone and Telegraph Company, the complainant in the above-entitled action, to the amended answer of City of Pomona, a municipal corporation, and the Board of

Trustees of said City of Pomona, Mel Campbell, M. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker as the Superintendent of Streets in and for the said City of Pomona, R. G. Loucks as City Attorney of said City of Pomona, and S. C. Slanker and R. G. Loucks, the respondents in the above-entitled action:

This repliant, saving and reserving unto itself all and all manner of advantage of exception to the manifold insufficiencies of the said amended answer, for replication thereunto, saith: That it will aver and prove its bill of complaint in the above-entitled action to be true, certain and sufficient in the law to be answered unto, and that the said amended answer of the said respondent is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in said amended answer contained, material or effectual in the law, to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this
217 Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

PILLSBURY, MADISON & SUTRO,
Solicitors for Complainant.
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER, AND
WILLOUGHBY RODMAN, *Of Counsel.*

UNITED STATES OF AMERICA,
State of California, Southern District of California, County of Los Angeles, ss:

Willoughby Rodman, being first duly sworn, deposes and says that he is a citizen of the United States, over the age of 21 years; affiant further says that on the 4th day of May, 1904, he served the within replication upon Robert G. Loucks, solicitor for respondents in the within-entitled action, by leaving a copy of said replication in a conspicuous place in the office of said Robert G. Loucks, to wit: upon the desk of said Loucks in said office, said office being in the City of Los Angeles, County of Los Angeles, State of California.

WILLOUGHBY RODMAN.

Subscribed and sworn to before me this 4th day of May, 1907.

WM. M. VAN DYKE,
Clerk U. S. Circuit Court, Southern District of California,
By CHAS. N. WILLIAMS,
Deputy.

218 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co. vs. City of Pomona et al. Replication. Received Copy of the Within Replication, this

4th day of May, 1907. —— ——, Solicitor for Respondents. Filed May 4, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law. Kohl Building, San Francisco.

In the United States Circuit Court, Ninth Circuit, Southern District of California.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA, etc., et al., Respondents.

Stipulation [for Submission of Cause].

It is hereby stipulated, by and between the respective parties to the above-entitled action, that the evidence in said action, upon which the said action is hereby submitted to the Honorable, the above-entitled court, for its decision and judgment, are the affidavits, certified copies of records, maps, notices and all other papers and documents now on file in this cause in the office of the clerk of the said court, with like force and effect as if said evidence had been pro-
219 duced by the taking of testimony in said cause, and said evidence to be in lieu of any testimony taken in said cause.

It is further stipulated that the arguments upon which said cause is hereby submitted to the Honorable, the above-entitled court, for its decision and judgment, are the briefs now on file in said cause, subject to the right of the parties hereto to file supplemental briefs and the right to be heard on final argument on the law and evidence.

It is further stipulated that subject to their relevancy, competency and materiality, the respondents may offer certified copies of the following papers:

1. Mortgage or deed of trust of the Sunset Telephone and Telegraph Company to secure its bonded indebtedness.

2. Ordinance of the City of Los Angeles, No. 1130 N. S.

3. Ordinances of the City of Pasadena Nos. 75 and 430.

It is further stipulated that there are in the City of Los Angeles (this stipulation being also subject to the relevancy, competency and materiality of the facts stipulated to) fifty (50) long distance operators, four hundred (400) local operators, six (6) Exchanges or Central Offices, one (1) telegraph operator at the Main Office, and that in 1906 there were five (5) telegraph operators; and the respondents

contend that these are all operated by the Pacific States Tele-
220 phone and Telegraph Company, and the complainant contends that they are all operated by it.

Dated July 12, 1907.

PILLSBURY, MADISON & SUTRO,
Attorneys for Complainant.
ROBERT G. LOUCKS,
Attorney for Respondent
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Of Counsel for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona, etc., et al. Stipulation for Submission of Cause. Filed Jul. 12, 1907. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law. Kohl Building, San Francisco.

221 [*Record of Enrollment.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Corporation), in the County of Los Angeles, State of California; the Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Defendants.

The complainant filed its Bill of Complaint herein on the 5th day of September, 1905, which is hereto annexed.

A subpœna to appear and answer in said cause was thereupon, on said 5th day of September, 1905, issued, returnable on
222 the 2d day of October, 1905, which is hereto annexed.

On the 6th day of November, 1905, the Answer of the Defendants the City of Pomona (a Municipal Corporation) and the Board of Trustees of said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of

Pomona, S. C. Slanker (improperly sued herein as S. C. Slemker), as the Superintendent of the streets in and for the said City of Pomona, R. G. Loucks as City Attorney of said City of Pomona, and S. C. Slanker, (improperly sued herein as S. C. Slemker), and R. G. Loucks, to the Bill of Complaint was filed herein and is hereto annexed.

On the 4th day of December, 1905, the exceptions for impertinence taken by the complainant to the answer of certain defendants were filed herein, and are hereto annexed.

On the 4th day of December, 1905, the exceptions for scandal taken by the complainant to the answer of certain defendants were filed herein, and are hereto annexed.

On the 4th day of December, 1905, the exceptions for insufficiency taken by the complainant to the answer of certain respondents were filed herein, and are hereto annexed.

On the 14th day of May, 1906, the Court made and entered an order herein overruling certain exceptions taken by the complainant to the answer of defendants, and sustaining certain other exceptions, and granting leave to the defendants to file an amended an-
223 swer herein, a copy of which order is hereto annexed.

On the 1st day of December, 1906, the amended answer of the defendants the City of Pomona (a municipal corporation) and the Board of Trustees of said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker (improperly sued herein as S. C. Slemker(as the Superintendent of the streets in and for the said City of Pomona, R. G. Loucks, as City Attorney of said City of Pomona, and S. C. Slanker (improperly sued herein as S. C. Slemker), and R. G. Loucks to the Bill of Complaint, was filed herein, and is hereto annexed.

On the 7th day of January, 1907, the exceptions for impertinence taken by the complainant to the amended answer of the defendants were filed herein, and are hereto annexed.

On the 11th day of March, 1907, the Court made and entered an order herein confirming the report of the Special Master in all respects except as to the first exception, and allowing said first exception, a copy of which order is hereto annexed.

The replication of complainant to the answer of defendants was filed herein on the 4th day of May, 1907, and is hereto annexed.

Said cause was thereafter submitted to the Court upon the affidavits and documentary evidence produced on the hearing of the application for temporary injunction.

224 On the 21st day of October, 1907, being a day in the July Term, A. D. 1907, of said Circuit Court—Present: The Honorable Olin Wellborn, District Judge—said cause came on to be heard before the Court, on the pleadings and proofs, and the hearing having been proceeded with on said day, and the Court having heard the pleadings and proofs and the arguments of counsel, and the cause having thereupon been submitted to the Court for its consideration and decision upon the pleadings, proofs and arguments,

and upon the briefs thereafter to be filed; and the Court having duly considered the same, and being fully advised in the premises, thereafter, on the 31st day of August, 1908, being a day in the July Term, A. D. 1908, of said Circuit Court, ordered that a decree be entered herein that the temporary injunction herein be dissolved, and complainant's bill of complaint herein be dismissed; and accordingly, on the 19th day of December, 1908, a final decree was signed, filed, entered and recorded herein, and is hereto annexed.

Whereupon, said Bill of Complaint, Subpœna, Answer of Certain Defendants, Exceptions for Impertinence to Answer of Certain Defendants, Exceptions for Scandal to the Answer of Certain Defendants, Exceptions for Insufficiency to the Answer of Certain Respondents, Copy of Order of May 14th, 1906, Amended Answer of Certain Defendants, Exceptions for Impertinence to the Amended Answer of Certain Defendants, a Copy of Order as to Report of Special Master Replication to Answer and said Final Decree are hereto annexed, said Final Decree being duly signed, filed,
225 and enrolled, pursuant to the practice of said Circuit Court.

Attest, etc.,

[SEAL.] WM. M. VAN DYKE,
Clerk,
By CHAS. N. WILLIAMS,
Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

No. 1209. In Equity.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents.

226 *Final Decree on Hearing.*

This cause, pursuant to stipulation of the parties, having been fully and finally submitted to this Honorable Court, upon bill of complaint, amended answer and replication, and upon affidavits and other documentary evidence, and the respective parties having stipulated that final decree be made and entered upon said pleadings, affidavits and evidence, and an opinion by this Honorable Court having been delivered and filed herein on August 31st, 1908,

ruling and finally deciding in favor of respondents herein, and authorizing this final decree:

Therefore, upon consideration thereof, it is ordered, adjudged and decreed that the temporary injunction herein be dissolved and complainant's bill of complaint herein be, and the same is hereby dismissed, and that respondents recover their costs herein, taxed at the sum of $—

Dated Los Angeles, California, December 19, 1908.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a Corporation, Complainant, vs. City of Pomona, et al., Respondents. Final Decree on Hearing. Filed Dec. 19, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law. Kohl Building, San Francisco.

227 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division

No. 1209.

THE SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA et al., Defendants.

Conclusions of the Court on Application for Preliminary Injunction.

First. The allegations of the bill bring it within the jurisdictional rules enunciated in Pacific Ry. Co. v. Los Angeles, 194 U. S. 112, same case 118 Fed. 746, and Riverside & A. Ry. Co. vs. Riverside, et al., 118 Fed. 736, and the case, therefore, is one of Federal cognizance.

Second. That the suit involves a substantial controversy as to the right of the complainant to have and operate its lines, poles and wires on defendant's streets without a special franchise from defendant, is perfectly obvious. It is equally obvious, that defendant will suffer but little, if any, harm from a continuance of said lines in its streets during the pendency of the suit, though it should be ultimately held, that said lines are now unlawfully maintained, while complainant would suffer great, if not irreparable, injury
228 from the destruction or removal of said lines, if the Court should ultimately sustain the claims of the bill.

The questions of law for determination on the merits, being important and not free from difficulty, should be reserved until the final hearing.

This brief summary shows clearly, that the situation of the parties

as it existed when the suit was commenced, should be preserved until their rights have been adjudicated. The doctrine here controlling the comparative hardships was applied by me in The Copper King, Limited, vs. Wabash Mining Co., 114 Fed. 991, 992, as follows:

"A temporary injunction in this suit would probably work less hardship than its refusal, and, where the title to property is in dispute, such a circumstance is often, on preliminary hearing, determinative in favor of the complainant. 1 Beach, Inj., §§ 307, 308; High, Inj. (3d Ed.), § 1508; Hicks vs. Compton, 18 Cal. 206; Real Del Monte Consol. Gold & Silver Min. Co. vs. Pond Gold & Silver Min. Co., 23 Cal. 83; Hunt vs. Steese, 75 Cal. 620, 17 Pac. 920; Paige vs. Akins, 112 Cal. 401, 44 Pac. 666."

Such also is the English rule, as appears from the following extract:

"Now, in the first place, I have looked, as far as I have been able, through the case made upon the affidavits, and upon the pleadings; and, in looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all
229 events. It is quite sufficient if the Court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a Court of Equity; and on that I think it would be very difficult here to raise any dispute." (Glasscott vs. Lang, 3 Milne & Craig's Reports 455.)

To the same effect, the Supreme Court of California has said:

" 'Especially will this discretion be exercised * * * when it is apparent to the Court that a dissolution of the injunction would result in greater injury and hardship than its continuance to the hearing, or where it is apparent that by a dissolution complainant would lose all the benefit which would otherwise accrue to him should he finally succeed in his cause. * * * So where the case, as presented by the bill, is one which seems to require investigation, and the effect of dissolving the injunction would be to place the property which is the subject of controversy beyond the control of the Court in which the action is pending, and would be equivalent to a complete denial of the relief sought by the bill, the injunction will not be dissolved.' (High on Injunctions, secs. 1508, 1509.)

" 'If the continuance of the injunction, even admitting defendant's answer to be true, cannot prejudice, or imperil his rights, and on the other hand, its dissolution might seriously impair the rights of complainant, the motion to dissolve upon the coming in of an answer should not be allowed.'

230 " 'It is also held that where the injunction is not merely ancillary to some other or principal relief sought by the action, but is itself the principal relief desired, and its dissolution would be equivalent to a dismissal of the action, if a reasonable doubt exists in the mind of the Court whether the bill is sufficiently negatived by the answer, it is proper to refuse a dissolution, and continue the injunction to the hearing.' (High on Injunctions, sec. 1512.)" (Porter vs. Jennings, 89 Cal. 443, 444.)

The rule has been elsewhere stated as follows:

"Finality of the Decision.—It is not proper, on an application for a preliminary injunction, to decide, or to consider with a view to a final decision, the merits of the controversy, especially where grave questions of law are involved; and the court should do no more than determine that the bill, assuming its allegations to be true, sets forth facts sufficient to warrant the issuance of an injunction." (10 Ency. of Pl. & Pr. 1010.)

Complainant's brief contains a number of citations in line with the authorities above cited, among them being the following: City of Newton vs. Lewis, 79 Fed. 715; Utah N. & C. Ry. Co. vs. Utah & C. Ry. Co., 110 Fed. 879; Allison vs. Corson, 88 Fed. 551; Indianapolis Gas Co. vs. City of Indianapolis, 82 Fed. 245, 246; Dimmick vs. Shaw, 94 Fed. 266, 268; Cohen vs. De Livinia, 104 Fed. 946; and Cartersville Light & Power Co. vs. Mayor, etc., of City of Cartersville, Georgia, et al., 114 Fed. 699, 700). In the last case, the Court, at page 700, says:

231 "This case has now been heard on the bill, answer, certain records and documents, and ex parte affidavits, on an application for injunction pendente lite.

"If it was clear that the plaintiff would not, on the final hearing, be entitled to an injunction, it would be proper to determine this controversy on its merits; but such is not the case. There are very interesting and doubtful questions of law involved and sharp conflict in the evidence as to some very material facts.

"Since the oral argument of the case counsel on both sides have furnished me with full and elaborate briefs. With the benefit of these I have, as soon as opportunity offered, gone over this entire record, and my judgment is that it is a case which should not be disposed of on this application for preliminary injunction. It should not be determined on its merits until the evidence can be taken by depositions on examination and cross-examination of witnesses. The proper course for the court in a case like this is to preserve the status until a final hearing can be had."

A temporary injunction will issue as prayed for in the bill.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1209. U. S. Circuit Court, Southern District of California, Southern Division. The Sunset Telephone & Telegraph Co. vs. The City of Pomona et al. Conclusions of the Court on Application for Preliminary Injunction. Filed Sep. 24, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

232 In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY, Complainant,
vs.
CITY OF POMONA et al., Defendants.

Statement of the Case.

Complainant, a California corporation, does a telephone business in the City of Pomona, California, and for this purpose has constructed and maintains local lines running from its central station to its subscribers in said city. Complainant also does a telephone and telegraph business in the States of California, Oregon, Washington and Nevada, under one general system, owning and using 133,000 miles of wire, of which more than 35,000 miles are used exclusively for long distance messages, 130,000 telephones, 1200 offices, of which 451 are exchange stations, and over 100,000 poles, and the lines of this system run into said city and terminate at said central station.

Complainant claims that its local lines in Pomona are an integral part of its general telegraph system, and aid in and complete the transmission of interstate telegrams to and from its sub-
233 scribers in said city.

On August the 8th, 1888, the City of Pomona passed an ordinance, No. 30, granting to Sunset Telephone-Telegraph Company (a corporation distinct and separate from the complainant) a franchise to erect and maintain for a period of ten years poles and telephone wires along the streets of the city, which franchise expired by its own limitation, August the 8th, 1898.

In April, 1889, complainant was incorporated, and in May, 1889, the grantee in said ordinance transferred all of its property to complainant, and since then complainant has maintained and operated its lines in said city.

From August the 8th, 1898, the date of the expiration of Ordinance No. 30, until about the middle of the year, 1902, complainant, in extending and enlarging its system in Pomona so as to accommodate new subscribers, expended more than ten thousand dollars, and about May, 1904, expended more than $6700 in changing and reconstructing its poles and wires on Second Street in said city, and, in addition to said sums, expended $1500 in extension work, subsequent to October the 23d, 1903, and claims, that said expenditures were made with the acquiescence and consent, and under the direction of the city, and, further, that the expenditure of $6700 was made also in consideration of the recognition by the city of the right of complainant to maintain and operate its system in said city, without securing a franchise from the city.

234 Complainant also claims that the construction, maintenance and operation of its lines were an acceptance of the terms of

section 536 of the Civil Code of California, and an inviolable contract was thus created between the State and itself.

The foregoing claims of complainant are disputed by respondent, and the Court's deductions from the evidence on said issues are indicated in its opinion.

The statutes construed by the Court are not set forth in its opinion, and, therefore, copies of those most frequently referred to will be given here.

Section 536 of the Civil Code of California, as re-enacted March the 20th, 1905, is as follows:

"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." Statutes California, 1905, pgs. 491, 492.)

Prior to its re-enactment, telephone companies were not mentioned in the section.

The first section of the Act of March the 22d, 1905, entitled: "An act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," is as follows:

235 "Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any county, city and county, city or town within this State except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise." (Statutes California, 1905, p. 777.)

The Act entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military and other purposes," approved July the 24th, 1866, 14 U. S. Stat. L. 221, and embodied in sections 5263 to 5268 of the U. S. Revised Statutes, is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post-roads of the United States,

236 which have been or may hereafter be declared such by act of Congress, and over, under or across the navigable streams

or waters of the United States: Provided, that such lines of telegraph shall be so constructed or maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post-roads. And any of said companies shall have the right to take and use from public lands, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance and operation of said lines of telegraph and may pre-empt and use such portion of the unoccupied public lands, subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SEC. 2. And be it further enacted, That telegraph communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. And be it further enacted, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: Provided,
however, That the United States may at any time after the
237 expiration of five years from the date of the passage of this
act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"SEC. 4. And be it further enacted, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act."

On the 14th day of December, 1897, complainant filed with the Postmaster-General its written acceptance of the restrictions and obligations required by said Act of Congress.

In the Act of Congress entitled "An Act to revise, consolidate and amend the Statutes relating to the Postoffice Department," approved June the 8th, 1872, 17 U. S. Stat. L. 283, 309, and embodied in U. S. Revised Statutes, sec. 3694, is the following provision:

"SEC. 205. That all letter carrier routes established in any city or town for the collection or delivery of mail matter by carrier are hereby declared post routes."

The Act of Congress entitled "An Act making all public roads
and highways post routes," approved March 1st, 1884, 23
238 U. S. Stat. L. 3, chap. 9, provides: "That all public roads and
highways, while occupied by and maintained as such, are hereby declared to be post routes."

On the 6th day of June, 1905, the Board of Trustees of the City of Pomona passed a resolution, of which the following is a copy:

"Whereas, the Sunset Telephone and Telegraph Company, a corporation, is now, and during all the times herein mentioned was, engaged in local telephone business in the City of Pomona; and

"Whereas, said Company obtained a right and franchise for telephone purposes only, from said city to enter and do business in said city for the period of ten years, on August 8th, 1888, as evidenced by Ordinance No. 30 of said city; and

"Whereas, by the terms of said Ordinance said franchise expired during the year 1898, and said Company now has no franchise nor any right from said city, nor at all to use, occupy or obstruct the streets of said city for telephone purposes; and

"Whereas, the Trustees of said City have repeatedly requested and still request said Company to secure from said city such franchise as will compel an observance of those or similar conditions contained in the franchise now held by the Pomona Valley Telephone and Telegraph Union, a corporation, so that there will be no discrimination between the two companies doing in competition a similar local or State business; therefore, be it resolved, that said Sunset Telephone and Telegraph Company be, and is hereby notified to appear
239 before this Board of Trustees on Thursday, June 15, 1905, at 7:30 P. M., at the City Hall, Pomona, California, to show cause, if any it has, why it should not obtain such franchise from said city, and upon its failure or refusal to immediately apply for and secure said franchise why the telephone poles and wires and apparatus of said Company should not be declared a public nuisance, and the Street Superintendent of said city be instructed to remove said poles, wires and apparatus from the streets of said City; and

"Be it further resolved, that the City Clerk be instructed to serve a certified copy of this resolution upon the said Sunset Telephone and Telegraph Company at its office in Pomona, California."

On the 1st day of August, 1905, said Board of Trustees passed a resolution, a copy of which is as follows:

"Whereas, the Sunset Telephone-Telegraph Company, a corporation, by a resolution duly adopted June 6th, 1905, a certified copy of which was served on said Company, cited said company to appear before this Board of Trustees on Thursday, June 15th, 1905, at 7:30 P. M., at the City Hall, Pomona, California, to show cause, if any it has, why it should not obtain a franchise from said city for the purposes stated in said resolution and citation, and upon default thereof why the telephone poles, wires and apparatus of said Company should not be declared a public nuisance and removed from the streets of said City; and

240 "Whereas, at the time and place appointed said Company failed to make any appearance in response to said resolution, and no showing at all having been made justifying its obstruction and occupancy of the streets of said City by said Company,

"Therefore, be it resolved, that the telephone poles, wires and apparatus of said Sunset Telephone-Telegraph Company employed in doing State and local telephone business within the city of Pomona (and not including poles, wires and apparatus used exclusively for telephone business done to or from points without the State, and not including any poles, wires and apparatus used exclusively for tele-

phone business done for the Government of the United States, its officers or agent, if any), be and all of them are hereby declared to be an obstruction and a public nuisance on all the streets of said city; and,

"Further Resolved, that the Street Superintendent of said City be and he is hereby instructed to forbid and prevent any future installation, or extension of said telephone poles, wires and apparatus; and,

"Further Resolved, that unless said Company obtains such a franchise from said city within thirty (30) days from date hereof, that the Street Superintendent of said City be and he is hereby further instructed to remove all said telephone poles, wires and apparatus from the streets of said City.

"The passage of this resolution is to be deemed a further notice to said Company, and to give it an opportunity and thirty days more time in which to remove its said telephone poles, wires
241 and apparatus from the streets of said City.

"The City Clerk shall certify to the passage of this resolution and shall cause a certified copy of the same to be served upon said Sunset Telephone-Telegraph Company at its office in Pomona, California."

And, on the 11th day of August, 1905, a notice was served upon complainant, of which the following is a copy:

"To Sunset Telephone and Telegraph Company, a corporation:

"In accordance with the instructions of the Board of Trustees of the City of Pomona, contained in its resolutions to the Sunset Telephone and Telegraph Company, made and dated respectively June 6th, 1905, and August 1st, 1905, and the laws in such cases made and provided, prescribing the powers and duties of Street Superintendent, the following notice is hereby given said Sunset Telephone and Telegraph Company:

"Under said resolutions and by virtue of the powers and duties of the office of Street Superintendent of said city, you are hereby notified that in accordance with the facts and conclusions stated in said resolutions, which are hereby made the facts and conclusions of the undersigned Street Superintendent, all the poles, wires and apparatus of said Company employed in doing a State and local telephone business within the City of Pomona, are hereby declared a public nuisance and obstruction upon all the streets of said city and hereby ordered to be removed from all the streets of said city within thirty days from August 1st, 1905, or I shall imme-
242 diately proceed to remove the same.

"You are expressly and particularly notified that I will remove only the poles, wires and apparatus of said company doing a State and local telephone business within said city; and that I will not remove or in any manner interfere with, but as to such removal, will 'except telegraph or telephone lines doing an interstate business,' if any, and will also except from the order of removal all the poles, wires and apparatus of said Company doing said 'interstate business,' if any.

"In event you do not voluntarily remove said poles, wires and apparatus doing said State and local telephone business within said

period of thirty days from August 1st, 1905, then you are hereby solicited now and before said period of thirty days expires to co-operate with me and assist in the designation of the poles, wires and apparatus of said company doing said State and local telephone business, and in all other matters and things whatsoever, so that there will be no mistake and as little inconvenience as possible to said company and the public; also I desire at same time the designation by you of a place in which to put said poles, wires and apparatus.

"The words 'telephone' and 'telegraph' are not used synonymously, but according to their popular meaning and distinction.

"S. C. SLEMKER,
"Street Superintendent of the City of Pomona.

"Dated August 10th, 1905."

243 On the 1st day of September, 1905, two of the respondents, S. C. Slemker and R. G. Loucks, begun the removal of complainant's telephone lines in said city, and continued to prosecute the same until the 5th day of September, 1905, when they were restrained from further interference with said lines by a restraining order issued in this case.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA et al., Defendants.

Opinion of the Court on Final Hearing.

This bill was filed to enjoin respondents from removing or interfering with any of complainant's poles and wires in the streets of the City of Pomona, and asserts a right of occupancy for said poles and wires in said streets, upon the following grounds, to wit:

First, the Act of Congress entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military, and other purposes," approved July 24th, 1866. 14 U. S. Stat. L. 221;

244 Second, Sec. 536 of the Civil Code of California;

Third, an alleged contract to that effect between complainant and the city.

In addition to the foregoing grounds, complainant contends, that, under Sec. 1 of the "Broughton Act" (Statutes of California, 1905, p. 777), it is not required to obtain a franchise from the city.

In view of the importance of the question involved, and the elaborate briefs filed, I should be glad, if circumstances allowed, to review, fully and in detail, the arguments of the respective parties.

This, however, is impracticable, on account of other pressing engagements, and I shall, therefore, simply announce my conclusions, in general terms, with occasional specific references to the testimony and authorities.

1. Complainant, as a telephone company, is not within the act of Congress heretofore mentioned, nor is it entitled, because of its telegraph business, if it does such business at Pomona, to claim the benefits of said Act as to the poles and wires used in the telephone business. Both these conclusions find abundant support, one expressly and the other by necessary implication, in Richmond vs. Southern Bell Telephone Co., 174 U. S. 761, where the Court, quoting the syllabus, held, that "The provisions in the act of July 24, 1866, entitled 'an act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes,' and Rev. Stat., §§ 5263 to 5268, in which those provisions are preserved, have no application to telephone companies, whose business is that of electrically
245 transmitting articulate speech between different parties."

In that case, complainant alleged in its bill, "That its 'telephone' wires and poles were used by its subscribers in connection with the Western Union Telegraph Company, under an agreement between the plaintiff and that company for the joint use of the poles and fixtures of both companies in sending and receiving messages; that its business was in part interstate commerce by reason of its connections with the above telegraph company; and that its status was that of a telegraph company under the laws of the United States and of the State of Virginia and of other States of the United States, and that it was and is in fact chartered as a telegraph company under the general laws of New York."

In the Circuit Court, a final decree was entered as follows:

"The Court, without passing on the rights claimed by the complainant company under the laws of Virginia and the ordinances of the city of Richmond, is of opinion and doth adjudge, order and decree, that the complainant company has, in accordance with the terms and provisions and under the protection of the act of Congress of the United States approved July 24, 1866 (which is an authority paramount and superior to any state law or city ordinance in conflict therewith), the right to 'construct maintain and operate its lines over and along' the streets and alleys of the city of Richmond, both those now occupied by the complainant company and those not now so occupied, and to put up, renew, replace and repair its
246 lines, poles and wires over and along said streets and alleys, and the said city of Richmond, its agents, officers and all others are enjoined and restrained from cutting, removing or in any way injuring said lines, poles and wires of the complainant company, and from preventing or interfering with the exercise of the aforesaid rights by the complainant company, and also from taking proceedings to inflict and enforce fines and penalties on said company for exercising its said rights. * * * "

In the Circuit Court the following action was also had:

"The city asked that the decree be modified by inserting therein

after the words 'construct and operate the same,' the following words: 'so far as to receive from and deliver to the Western Union Telegraph Company messages sent from beyond the limits of the State of Virginia, or to be sent beyond said limits'; and by inserting therein after the words 'interfering with the exercise of the aforesaid rights by the complainant company,' the following words: 'so far as the reception from and delivery to the Western Union Telegraph Company of any message sent from beyond the limits of the State of Virginia, or to be sent beyond said limits.' But counsel for complainant objected, and the court (using the language of its order) 'intending by said injunction to enjoin the city from interfering with the local business and messages, as well as those of an interstate character,' refused to so modify the decree."

I present these extracts from the bill and the decree and minutes of court in order to show the relation which the complain-
247 ant there bore to the Western Union Telegraph Company and the kind of services it rendered by virtue of such connection, because, from these facts, it is obvious, that the decision of the Supreme Court impliedly, but necessarily holds, that an association between a telephone company and a telegraph company whereby the telephone company receives from and delivers to the telegraph company messages sent from beyond the limits of the State or to be sent beyond said limits does not bring the telephone company within the purview of said Act. Now, if such an association of two companies is ineffectual to bring the telephone company under said Act of Congress, it would seem to follow, that said companies would be powerless to accomplish, through indirection and evasion, the same end, by merging themselves into one corporation and causing it to assume the attributes and employments of the two, or, to express the matter differently, that a single corporation, although organized for and engaged in both telegraph and telephone business, as above outlined, cannot, because of its telegraph business, claim the benefits of said Act of Congress as to the lines used in its telephone business; and this, in substance, has been unequivocally held by the Circuit Court of Appeals for the Sixth Circuit in Toledo vs. Western Union Telegraph Co., 107 Fed. 10.

Mutiplication of authorities on this point is unnecessary, but it may not be out of place to add, that the principles enunciated in the two cases already cited are further illustrated and applied in New York ex rel. Penn. R. R. Co. vs. Knight, 192 U. S. 21; and Allen vs. Pullman Co., 191 U. S. 171, and from these
248 principles it results that complainant's telephone lines and telegraph lines are separable and must be considered as distinct from each other. See, also, State vs. Western U. Tel. Co., 90 Pac. 299. This situation is aptly described in the brief, at pages 41 and 42, filed by amicus curiae, as follows:

"The local lines are no intrinsic part of any telegraph lines. The telegraph instrument or instruments are situated at the central station of the telephone company and telegraph messages per se, interstate or intrastate, if transmitted at all, are received at the station. The telegraph transmission then ceases. The mere fact that

the messages may be telephoned to subscribers, or other persons in the city, or that persons may send messages to the company's office, for telegraphic transmission by telephoning them to such office, does not make the telephone system to subscribers a part of the telegraph system. Only the main toll line extending from the central station to points outside the city can, by any construction, be regarded as a telegraph line. It is the only line engaged in telegraph business.

"The local telephone lines are no more a part of the telegraph lines than the United States mail would be if the telegram were received at the central office and mailed to the receiver. They are no more a part of interstate commerce, or of any telegraph system, or of the telegraphic transmission, than the messenger boy who bears the telegraph message to the consignee would be, or a telephone system not owned by the company, but used to communicate the message would be."

249 While there is no dispute but that the city of Pomona removed from its streets some of complainant's poles and wires, yet I think from all the evidence in the case, that the only poles and wires which said city removed, and certainly all it threatened to remove, as shown by the resolution of its Board of Trustees of August 1st, 1905, and the Street Superintendent's notice pursuant thereto, exhibits 3 and 4 to complainant's bill, are those which complainant used in its local and intrastate business, and these, as I have already indicated, are not protected by said Act of Congress.

Furthermore, while complainant has a telegraph instrument, installed not earlier than 1902, at its central station in Pomona, yet the number of telegraph messages transmitted over its lines to and from Pomona is so inconsiderable as of itself to raise the question, whether or not complainant may be fairly said, from a commercial standpoint, to be engaged in a telegraph business at that point. It is true, complainant's affidavits show, that, over all its long distance lines in California, Oregon, Washington and Nevada more than six thousand messages are transmitted each month, and that sixteen per cent of these messages are by telegraph, but they are absolutely silent as to what portion of said sixteen per cent of telegraph messages reach Pomona. In this connection, it is especially important to bear in mind that the burden is on the complainant to establish the telegraph and interstate character of its business (Penn. R. R. Co. vs. Knight, 192 U. S. 21, 27), as well as every other ground essential to the equitable relief it seeks, and its

250 failure, while giving with precision other figures showing the interstate and telegraph business over all its lines, to indicate how much of said business was done at Pomona, when the point is vital to its case, and the facts exclusively within its knowledge and easily accessible, is, under elementary rules of evidence, a strong, if not controlling circumstance against the claim, that its business at said place, is, from a commercial point of view, interstate and telegraphic. In this condition of the evidence, general statements, such as some of the affidavits contain, to the effect, that complainant does

an interstate and telegraph business there, without giving the particulars which the exigencies of complainant's case obviously require, are not only inconclusive, but entitled to but little weight, I am satisfied, from all the information which the record furnishes, that the number of telegraph messages received at and sent from Pomona over complainant's lines are extremely few, while unquestionably the great bulk of its business there is telephone business, and, that there is some ground for respondent's contention, that such interstate messages as have been transmitted were not in the course of commerce, but to establish the possibility of interstate transmission. To hold, under these circumstances, that complainant's telephone lines at Pomona, because of their potential agency in the receipt and delivery of telegraph messages between the central station of complainant and its subscribers, are an integral part of a telegraph system and therefore may be rightfully maintained in the streets of said city without its consent, under said Act
251 of Congress, would, it seems to me, be a manifest perversion of the statute, and directly in the teeth of the decision of the Supreme Court in Richmond vs. Southern Bell Telephone Co., supra, and the decision of the Circuit Court of Appeals in Toledo vs. Western U. Tel. Co., supra. While the interstate clause of the Federal Constitution should always be reasonably construed so as to promote the beneficent purposes for which it was ordained, it should never be employed as an instrumentality to take from a State its legitimate control over local business.

There is yet another view of said Act of Congress fatal to complainant's contention on this branch of the case. Said Act does not grant to telegraph companies the right to enter upon private property without the consent of the owner, nor the right of eminent domain. (Western U. Tel. Co. vs. Pennsylvania R. R. Co., 195 U. S. 540; Western U. Tel. Co. vs. Pennsylvania R. R. Co., 195 U. S. 594.) Nor does it confer upon them the right to occupy with their poles, wires and other fixtures the streets of a city without the latter's consent. (St. Louis vs. Western U. Tel. Co., 148 U. S. 92; St. Louis vs. Western U. Tel. Co., 149 U. S. 465; Postal Telegraph & C. Co. vs. Baltimore, 156 U. S. 210; Richmond vs. Southern Bell Tel. Co., supra; Toledo vs. Western U. Tel. Co., supra; Cumberland Tel. & Tel. Co. vs. Evansville, 127 Fed. 187.)

The conclusion of the Court in Western U. Tel. Co. vs. Penn. R. R. Co., 195 U. S. 540, 573, 574, is summarized thus: "It follows from these views, that the Act of 1866 does not grant the right to
252 telegraph companies to enter upon and occupy the rights of way of railroad companies except with the consent of the latter, or grant the power of eminent domain."

In St. Louis vs. Western U. Tel. Co., 148 U. S. 92, 100, the Court, in unequivocal terms, applies the same rule to public highways, as follows (underscoring mine):

"It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to

private rights. While a grant from one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. *No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communication, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State.* It would not be
253 claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the statehouse grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. While for the purpose of travel and common use they are open to the citizens of every State alike, and no State can by its legislation deprive the citizens of another State of such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another State, or a corporation of the national government, it is within the competency of the State representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation. It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of
254 the common use of the portion thus appropriated."

City of Toledo vs. Western U. T. Co., 107 Fed. 10, holds, quoting from the syllabus: "that an interstate telegraph company which had accepted the provisions of the Act of 1866 was not entitled to erect and maintain its lines over the streets of a city without complying with the reasonable regulations of the city for the erection and maintenance of said lines and without procuring a permit therefor from the city."

Cumberland Tel. & Tel. Co. vs. City of Evansville, 127 Fed. 186, is also a case strongly in point.

In opposition to the views I have above expressed, complainant

cited in its brief filed April 13th, 1906, three cases, and at the oral argument another one, which I will briefly notice in detail.

City of Wichita vs. Old Colony Trust Co., 132 Fed. 641, 649, is scarcely entitled to be considered a precedent on this point. The Act of Congress of July 24th, 1866, was not involved in that case, and the expression of the Court, with reference to telegraph companies, that "Their 'right of way' there has not been dependent on municipal consent," is obiter dictum.

The views, or rather doubts, expressed by Judge Wallace, in Western U. Tel. Co. vs. New York, 38 Fed. 552, 560, in regard to the threatened removal of complainant's wires from the structures of the elevated railway company, to antagonize the conclusion which I have announced above, but these antagonistic views, or doubts, of Judge Wallace must of necessity yield to the decisions of the
255 Supreme Court in the cases above cited.

San Francisco vs. Western U. Tel. Co., 96 Cal. 151, simply determines, that, under the facts of that case, a tax upon its franchise in addition to the taxes which complainant pays upon its property in common with others, was beyond the power of the state, and said case has but little bearing upon the point now under consideration.

In Western U. Tel. Co. vs. Visalia, 148 Cal. 744, the Court does say, that the plaintiff, by accepting the terms of the Act of July 24th, 1866, acquired a franchise for its telegraph lines in the streets of Visalia, and, that the plaintiff possessed the same franchise not only by virtue of said Act of Congress, but also under Sec. 536 of the Civil Code of California. These, however, seem to have been casual assumptions, and not essential to the decision. Furthermore, if said points had been directly involved, the case, notwithstanding the deservedly high character of the Bench by which it was decided, would have to yield, as a precedent, to the decisions of the Supreme Court of the United States above cited.

The comments which I have made upon the last case apply to St. Louis vs. Western U. Tel. Co., 63 Fed. 68, also cited to this point in complainant's last brief, page 44, so far as concerns the statement of the Court, that the telegraph company, as a governmental agency, under paramount authority of a Federal Congress, had the right to use the streets of the city without the city's consent.

256 Complainant, in its last brief, at page 51, also cites in this connection 125 U. S. 530. This case only holds that the complainant is exempt under the Act of July 24th, 1866, from taxes which the State of Massachusetts assessed against it, and certainly is no authority for the contention that, under said Act, a telegraph company may occupy the streets of a city without the city's consent, in the absence of any statute of the State giving it the right to do so.

On the next question to be determined, which is largely one of fact, my conclusion is, that the city of Pomona has never consented to the perpetual occupancy of its streets by complainant's lines. Certainly as far back as 1901 there is clear evidence of opposition on the part of the city to such occupancy without the procurement by complainant of a new franchise, and from the affidavit of E. E.

Armour it appears that, in 1899, after the expiration of the franchise granted by ordinance No. 30, complainant was notified by the Board of Trustees, that its franchise under said ordinance had expired, and that it had no franchise, privileges or other legal rights in said city. The expenditure of ten thousand dollars by complainant between 1898 and 1902 for the extension and improvement of its system in Pomona, and other expenditures made in the face of the notice above mentioned, certainly are no evidence of any contract between the parties or consent on the part of the city that complainant should for all time or indefinitely maintain its lines in the streets of said city.

257 There is much conflict in the evidence as to the matters which led up to the passage of the resolutions of Oct. 23, 1903, authorizing the street superintendent to grant permits for the extension of complainant's lines, and of Feb. 4, 1904, directing the removal of complainant's poles and wires from Second Street, as well as the subsequent occurrences connected with said resolutions.

In the minutes of the Board of Trustees of May 5th, 1903, occurs the following: "The request of Mr. Keyser, representing the Sunset Telephone Company, that the Company be allowed to extend the lines of the Company in the city to reach applicants for phone service pending the action of the courts on the question of the rights of the Company to operate in this State without franchise was on motion taken under advisement." This resolution, although Mr. Keyser's application was subsequently, on May 12th, 1903, withdrawn by Mr. Pillsbury, lends support to the affidavit of W. H. Posten and also other affidavits submitted by respondent that the resolution of Oct. 23rd, 1903, authorizing the street superintendent to grant permits to complainant for extensions of its lines was but a temporary provision to save complainant's business from injury during the period which the Board of Trustees supposed would elapse before there could be had a judicial settlement of the controversy between the parties as to complainant's right to maintain its lines in the streets of said city.

The evidence, however, fails wholly to satisfy me that the Board of Trustees of said city, by either or both of said resolutions, together with their related matters and occurrences, entered

258 into any contract with, or gave any consent for complainant unconditionally and for all time to maintain and operate its telephone lines in the streets of said city; on the contrary, I believe, that said city, since the expiration of the franchise granted by ordinance No. 30, has persistently sought to have complainant procure a new franchise, and never agreed or consented otherwise to occupancy of its streets by any of complainant's lines.

II. Does Section 536, Civil Code of California, confer upon complainant the rights which it claims in the streets of Pomona?

I am of opinion that the term "highway" in said Section includes "street." (Political Code, California, sec. 2618; Abbott vs. Duluth, 104 Fed. 833, 836, 837.)

Respondents contend, among other things, that said section is in conflict with certain provisions of the California Constitutions of

1849 and 1879, and that it is rendered ineffectual by certain other provisions of the Constitution of 1879, that it is not the grant of a franchise, but constitutes simply a license, and, further, that it does not preclude municipal corporations from fixing the time and conditions upon which their streets may be occupied, and, as one of such conditions, exacting compensation for the parts of the streets exclusively appropriated.

In the view which I take of the case, it is unnecessary for me to pass upon either of said contentions, and I shall, therefore, forbear any discussion of them and assume, without, however, so de-
259 ciding, that they are unmeritable.

Said section did not, as originally passed, March 21st, 1872, not until re-enacted March 20th, 1905, include telephone companies. (Richmond vs. Southern Bell Telephone Company, 174 U. S. 761.) Of course, I am not unmindful of Davis vs. Pacific Tel. & Tel. Co., 127 Cal. 313, nor of the rule of the United States Courts, that they are bound by the construction given to a State constitution or statute by the highest court of the State.

In support of this rule complainant, at pages 78 and 79 of its last brief, filed May 19th, 1908, groups quite a large number of cases, and, in a note to Burgess v. Seligman, 107 U. S. 34, there is a list of nearly fifty cases bearing upon the subject. It is unnecessary, however, to review them in detail here, since there is no controversy as to the general rule.

To said rule, however, as I have stated it, there are several exceptions, one of them being, that, where a Federal question is involved, the construction of the State court is not conclusive. This exception is a part of the statement of the rule in the first case cited by complainant, Fairfield vs. County of Gallatin, 100 U. S. 47, the first paragraph of the syllabus being as follows: "Where no Federal question is involved, this Court will follow the construction which has been uniformly given to the constitution or the laws of the State by its highest court."

The exception is also embodied in the rule as stated in the next case cited by complainant, Walker vs. State Harbor Commissioners, 84, U. S. 648, 651, the Court saying: "In the construction of
260 the statutes of a State, and especially those affecting titles to real property, where no federal question arises, this Court follows the adjudications of the highest court of the State."

There are also limitations, as well as exceptions, to the rule as I have broadly phrased it, but both the exceptions and limitations, or some of them, are often omitted in cases where the rule is applied, for the reason that the facts of the cases do not raise or suggest them.

Federal Statutes Annotated, Vol. 4, page 524, however, formulates the rule, embodying its exceptions and limitations, with sufficient accuracy and fullness for all practical purposes, as follows:

"The construction by the highest judicial tribunal of a state of its constitution or statutes, which establishes a rule of property, is controlling authority in the Courts of the United States where no

question of right under the constitution and laws of the nation and no question of general or commercial law is involved."

Under the rule thus stated, Davis v. Pacific Tel. & Tel. Co., supra, is not controlling authority in the Federal Courts, for at least four reasons:

First. The word "telegraph" is so often employed throughout the country in legislative enactments and judicial decisions, that its definition would seem to be a matter of general, rather than local law.

Second. The Davis case does not establish a rule of property, but only determines a question of criminal liability.

261 Third. Said case is not a construction of Section 536 of the California Code, but simply a definition of the word "telegraph" in Section 591 of the Penal Code of the State. In that case, the Court, after giving to the word "telegraph" a wider scope than consistent with its etymology, says:

"But is this construction justifiable in the case of the penal statute: Section 4 of our Penal Code provides that 'the rule of the common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice.' In contemplation of this section, in recognition of the fact that a substantial identity exists between the two words, we think no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire."

Thus it appears that the conclusion of the Court was reached only by disregarding the common-law rule of strict construction, which Sec. 4 of the Penal Code requires to be done, whereas Section 536 of the Civil Code, being a grant from the State, upon its acceptance by the corporation, should be strictly construed. The Davis case, therefore, is not a construction of Section 536; on the contrary, the inference is a fair one, from the very language of the Court, that, if it had been passing upon said section, under a strict rule of construction, a more limited meaning would have been given to the word "telegraph," and telephone companies would

262 have been excluded from the operation of the section.

Recurring to Richmond vs. Southern Bell Telephone Co., supra, it is to be observed, that the Supreme Court of the United States was there construing an Act of Congress substantially similar to Section 536 of the California Code, both of them granting privileges to telegraph companies in public roads and highways.

Fourth. The case at bar involves a Federal question, which can be aptly stated in complainant's own language, by quoting from its brief filed April 13th, 1906, pages 99 and 100, as follows:

"Upon its incorporation in 1899, the complainant, therefore, obtained the benefits of the provisions of Section 536 of the Civil Code. By its acceptance of the same and by the construction, maintenance and operation of its telephone and telegraph lines, throughout the State of California, including Pomona, a contract was created between the State of California and the complainant. This contract

became inviolate and could not be impaired by any subsequent legislation."

After referring to the franchise acts, the brief continues as follows: on page 100:

"None of the foregoing acts, however, even if applicable to the complainant, could, under the clearest prohibitions of the State and federal constitutions, affect it or impair the contract, which had been created between it and the State, by its acceptance of the provisions of Section 536 of the Civil Code, and the construction, maintenance and operation of its lines in the State of California,
263 including the City of Pomona. These acts could, we submit, be given only a prospective construction, and they could, in any event, be applicable only to new enterprises, undertaken after their passage. Any other construction would be in the teeth of those prohibitions of the Federal and State Constitutions, which forbid the impairment of contracts, and which declare that no person shall be deprived of property without due process of law."

The Federal question is also expressly alleged in paragraph 11 of the Bill, as follows:

"And that this case is a suit arising under the Constitution of the United States, to wit: under subdivision 1 of section 10 of article 1 of said Constitution, and under section 1 of articlce 14 of the amendments of said Constitution * * * ."

There is a long and unbroken line of decisions by the Supreme Court of the United States, expressly holding that the rule as to the conclusiveness of the construction placed upon a State statute by the highest authority of the State does not apply where a Federal question, like the one in the case at bar, is involved. (Ohio Life Ins. & Tr. Co. v. Debolt, 57 U. S. 415, 432, 433; Jefferson Branch Bank vs. Skelley, 66 U. S. 436, 443; Bridge Proprietors vs. Hoboken Co., 68 U. S. 116, 145; L. & N. R. R. Co. vs. Palms, 109 U. S. 244, 256, 257; Vicksburg etc. R. R. Co. vs Dennis, 116 U. S. 642, 667; Shelby County vs. Union etc. Bank, 161 U. S. 149, 151.)

In the first of said cases, Ohio Life Ins. & Tr. Co. vs. Debolt, 57 U. S. 432, the Court says:

264 "It has been contended, on behalf of the defendant in error (the treasurer of the State), that the construction given to these acts of assembly by the State courts ought to be regarded as conclusive. It is said that they are laws of the State, and that this Court always follows the construction given by the State courts to their own constitution and laws.

"But this rule of interpretation is confined to ordinary acts of legislation, and does not, extend to the contracts of the State, although they should be made in the form of a law. For it would be impossible for this Court to exercise any appellate power in a case of this kind, unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment upon this

subject, it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature, or of a covenant or agreement by one of its agents acting under the authority of the State."

In the next of said cases, Jefferson Branch Bank vs. Skelly, 66 U. S. 443, the same doctrine is enunciated in the following language: :

"We answer to this, as this Court has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation, and to State
265 constitutions have been conclusive upon this Court with a single exception, and that is when it has been called upon to interpret the contracts of States, 'though they have been made in the forms of law,' or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this Court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its
266 judgment in such a case, it makes no difference in the obligation of this Court in reversing the judgment of the Supreme Court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State, by its authority."

In Vicksburg etc. Bank vs. Dennis, 116 U. S. 667, the Court says:

"In determining whether a statute of a State impairs the obligation of a contract, this Court doubtless must decide for itself the existence and effect of the original contract (although in the form of a statute) as well as whether its obligation has been impaired. Louisville & Nashville Railroad vs. Palmes, 109 U. S. 244, 256, 257, and cases cited; Wright vs. Nagle, 101 U. S. 791, 794."

There are other conditions and circumstances where the constructions State courts give to State statutes are not conclusive upon the

United States Courts, but, without undertaking a classification of these instances, I will simply cite a few cases illustrative of them. (Pease vs. Peck, 18 How. 598; Dred Scott vs. Sanford, 18 How. 393; Yick Wo vs. Hopkins, 118 U. S. 356; Town of Roberts vs. Bowes, 101 U. S. 116; Talcott vs. Pine Grove, 23 Fed. Cas. 653, Cas. No. 13735; Levy vs. Stewart, 78 U. S. 244.)

Carroll vs. Lessee of Carroll, 16 How. 275, holds that the Supreme Court of the United States is not bound by an obiter dictum of a State court, and by analogy it seems to follow, that of still less weight with the United States Court, in determining the
267 meaning of a word used in a State statute, is the definition placed by the State Court upon that word in another statute, where the two statutes are entirely different, enacted for different purposes, and subject to different rules of construction.

The construction, which I have placed upon Sec. 536 answers fully the contention of complainant, at pages 99, et seq., of its printed brief, filed April 13th, 1906, and page 10 of its reply brief filed May 19th, 1908, that the construction, maintenance and operation of its telephone lines was an acceptance of the terms of said section as to said lines, and constituted a contract, inviolable by subsequent legislation, namely, the franchise acts. The cases from Minnesota and other States cited in complainant's brief to this contention, were based respectively upon general laws, which, although in some respects similar to Section 536 of the California Code, either expressly or by construction of the court applied to telephone companies, and this widely distinguishes all of said cases from the one at bar.

I am inclined to think that said contention is also met by the Constitution of 1879, Section 1 of Article 12, which provides:

"Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

268 And also Section 21 of Article 1, which provides:

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

(Shields vs. Ohio, 5 Otto, 319; Union Pac. R. R. Co. vs. U. S. 99 U. S. 700; Spring Valley W. W. vs. Schottler, 110 U. S. 347; Hamilton Gas L. & C. Co. vs. Hamilton, 146 U. S. 258; Stanislaus County vs. San Joaquin, K. R. C. & I. Co., 192 U. S. 201; San Antonio Traction Co. vs. Altgelt, 200 U. S. 304.)

A brief review, chronologically arranged, of the Franchise Acts of California is necessary to an intelligent understanding of their relations to and effect upon Section 536 of the California Code, and a correct determination of what rights, if any, complainant has under said section as it now stands, that is, as re-enacted March 22d, 1905.

The first franchise act was passed in 1893 (Stats. Cal. 1893, p. 298). Its provisions are certainly incompatible with the acquisition of a franchise under Section 536 of the Code, and, therefore, said Act must be held to have repealed said section. A somewhat similar repeal will be found in Northwestern Tel. Exch. Co. vs. St. Charles, 154 Fed. 386. The incompatibility between said Act and section is emphasized by the franchise act of 1897, which contains several additional provisos, among them the following: "that the governing power may reject any and all bids." (Stats. Cal. 1897, p. 135.)

269 Complainant, in its last brief, filed May 19, 1908, at page 10, says, referring to the franchise act of 1893, "It excepted all telegraph lines." This statement is wrong, inadvertently made, of course, and I now correct it merely because of its bearing upon the ruling which I have just made as to the repeal of Sec. 536. If the exception "all telegraph lines" had been made in the franchise act of 1893, then, of course, no repeal, nor even modification of Sec. 536 could have been thereby effected, because the exception would have been as broad as the section. The franchise act of 1893, however, contains no exception whatever. Complainant has confused the franchise act of 1893 with that of 1897, for there is an exception in the latter act, as follows: "except steam railroads, telegraph lines and renewal of franchises for piers, chutes and wharves."

The franchise act of March 11th, 1901, differs in this respect from that of 1897, and is as follows: "except telegraph or telephone lines doing an interstate business and renewals of franchises for piers, chutes or wharves." (State. Cal. 1901, p. 265.)

The franchise act of March 6, 1903, simply amends certain sections, to wit: 2, 5 and 7, but leaves unchanged Section 1 of the Act of March 11th, 1901.

Sec. 526, as re-enacted March 20th, 1905 (Stats. Cal. 1905, pp. 491, 492), includes telephone companies, and its re-enactment, because of the incompatibility above mentioned, doubtless repealed the first section of the then existing franchise act, which was the act of 1901, as amended by the act of 1903, so far as concerns

270 telegraph and telephone lines. The franchise act, however, of March 22d, 1905 (Stats. Cal. 1905, p. 777), passed just two days subsequent to the re-enactment of Sec. 536, in turn and for the same reason repealed Sec. 536, except as to telegraph and telephone lines doing an interstate business; in other words, repealed the section so far as concerns telegraph and telephone lines doing a local or interstate business.

So that said section, as it now stands, does not grant to a telephone company any right to maintain in a street poles and wires used in local or interstate business, and as I have already shown, these are the only lines with which the city of Pomona threatens to interfere.

On this branch of the case, Abbott vs. Duluth, 104 Fed, 833; Northwestern Tel. Exch. Co. vs. Minneapolis, 83 N. W. 527, 86 N. W. 69, and Duluth vs. Duluth Telephone Co., 87 N. W. 1127,

are without weight as precedents, because, in Minnesota the General Law of 1860, chapter 12, section 1, granting to telegraph companies, which the Court held included telephone companies, the right to erect poles and wires along the public roads and highways, was not limited to companies doing an interstate business, as is Sec. 536 of the California Code by the Broughton, or Franchise Act of 1905.

City of Wichita vs. Old Colony Trust Co., 132 Fed. 641, and Wichita vs. Missouri & Kansas Telephone Co., 78 Pac. 86 and 890, are likewise inapplicable here, because the general statute of the State of Kansas, "Gen. St. 1868 C. 23 S. 74," which con-
271 ferred upon telegraph companies authority to maintain poles, wires and other fixtures along the public roads, was without any such limitation to interstate commerce as the Broughton, or Franchise Act of 1905 imposes upon Sec. 536 of the California Code.

The distinction, which I have drawn between the case at bar and the Minnesota and Kansas cases, above mentioned, applies equally, with suitable changes of phraseology, to the Iowa, Wisconsin and Michigan cases cited in complainant's brief. Indeed, I have not found a case outside of California where the general law of the State authorizing telegraph and telephone companies to construct their lines along the public roads and highways was restricted to companies doing an interstate business, as is Sec. 536 of the California Code by the Franchise Act of 1905.

III. The evidence fails to establish, as I have already shown, any contract between complainant and the City of Pomona, other than by Ordinance No. 30, for the occupancy of the latter's streets with telephone lines of complainant.

Village of London Mills et al. vs. White et al., 70 N. E. 313, and the other cases in line therewith, cited under this head at page 16 of complainant's last brief, are so widely different as to material facts from the case at bar, that it is unnecessary to examine them in detail. In each of said cases, with one exception, the implied contract, which the Court held binding, grew out of the acceptance of an ordinance or resolution passed under statutory authority and expressly granting the franchise claimed.

272 In the case which I have excepted from this general statement, namely, City of Bradford vs. N. Y. & P. Tel. & Tel. Co., 56 Atl. 41, the suit was brought by the city to compel the removal from its streets of defendant's poles and wires, which had occupied the streets more than twenty-one years without any objection from the city authorities, and the bill was dismissed for laches.

In the case at bar, as I have already shown, Section 536 of the California Civil Code did not apply to telephone companies when complainant's lines were constructed in the City of Pomona, nor was there any ordinance or resolution ever passed by the Trustees of said city authorizing such construction, except ordinance No. 30, which limited to ten years the privileges it granted, and this period expired in August 1898. So that the first and most obvious element

of an implied contract, such as was found by the court in each of the cases cited by complainant, is wholly lacking in the case at bar.

I have given to the opinion of Judge Beatty, which forms, as an exhibit, part of the bill herein, that careful consideration which the high respectability of its authorship invites, but am unable to adopt its conclusions.

Complainant's contentions, that respondents removed its lines from the streets of Pomona in an irregular and unauthorized way, in that the resolution of August 1st, 1905, concerned "Sunset Telephone-Telegraph Company," a corporation separate and distinct from complainant, and in that the conditions of said resolution were impracticable, and in that the Board of Trustees directed the
273 removal by resolution rather than by ordinance, I think, are not well taken.

As complainant is unlawfully maintaining its interstate and local lines in the streets of Pomona, without right and against the city's consent, it will not be heard to say, that the removal of such unlawful obstructions was or is otherwise informal. A suitor must come into a court of equity with clean hands, and cannot, in such a forum, protect an unlawful occupancy of streets by asserting that such occupancy is being informally or irregularly disturbed.

The bill will be dismissed, and respondent's solicitor is requested to prepare and submit a suitable form of decree.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1209. U. S. Circuit Court, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co. vs. City of Pomona et al. Opinion of the Court on Final Hearing. Filed Aug. 31, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

274 [EVIDENCE ON BEHALF OF COMPLAINANT.]

[*Affidavit of F. W. Alston.*]

In the United States Circuit Court of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

F. W. Alston, being first duly sworn, deposes and says:

I am over the age of thirty-eight years. I know the Sunset Telephone and Telegraph Company, the complainant named in the

above-entitled action. I have been employed by the said Company continuously for more than ten years last past. I am now, and for several years last past have been, Chief Engineer of the said Company. For more than eighteen years last past I have continuously practiced my profession as an electrical engineer, and during all of the said time I have been practically engaged as such
275 engineer in the telegraph and telephone business. During said time I have been employed by and connected with the Colorado Telephone and Telegraph Company, the Chicago Telephone Company and the Central Union Telephone Company.

I have installed and directly superintended the installation of 600 exchanges on the Pacific Coast, accom-odating about 275,000 subscribers. For the Central Union Telephone Company I installed about 30 exchanges, accommodating about 21,000 subscribers, and for the Chicago Telephone Company I installed about 15 exchanges, accommodating about 100,000 subscribers.

I know that the Pacific States Telephone and Telegraph Company, a corporation, does not operate in the City of Pomona, State of California, or elsewhere in the said State of California, except in the City and County of San Francisco, in said State. I also know that the above-named complainant has a telephone and telegraph system in the said City of Pomona connected with the system of the said complainant in the State of California and in the States of Washington, Oregon and Nevada.

The said complainant has now and for several years last past has had, in the City of Pomona, appliances and instruments whereby telegraph messages can be sent and are sent and have been sent for more than four years last past from the said City of Pomona over the lines and wires of the said complainant to other cities and towns in the State of California and to cities and towns in the States of
276 Oregon, Washington and Nevada; said messages being sent entirely over the lines of the said complainant. The sending of said telegraph messages in no wise or manner interferes with the sending and transmitting of messages by articulate speech, otherwise called "telephoning." A telegraphic message can be sent over a wire at the same time and while the said wire is being used for telephoning, provided the said wire is equipped with proper telegraph and telephone instruments.

The complainant for some years last past has equipped with telegraph instruments many of its offices in the said State of California and many of its offices in the cities and towns of the States of Oregon, Washington and Nevada. The telegraph instruments used by the complainant are the ordinary key, relay and sounder, and the signals used are those ordinarily known as the Morse signals, generally used for telegraphic purposes. Any person having a telephone instrument connected with the system of the complainant, either in the City of Pomona, or elsewhere, can, if he so desires, and if he is able to use the same, have a telegraph instrument upon his premises for transmitting messages by telegraph over the same line used by such person for telephoning.

F. W. ALSTON.

Subscribed and sworn to before me this 18th day of January, 1906.

[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

277 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona et al. Affidavit of F. W. Alston. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of S. L. Brose.*]

In the United States Circuit Court of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

S. L. Brose, being first duly sworn, deposes and says:

I am over the age of thirty years. For more than nine years last past I have been employed by and am now employed by the
278 complainant in the above-entitled action. I am superintendent of construction of the complainant in the southern part of the State of California and have been such superintendent for several years last past. During the months of February, March, April, and the beginning of May, 1904, certain work of reconstruction in the City of Pomona was done under my immediate supervision and control.

I have read the affidavit of C. J. Corcoran made herein on the 16th day of January, 1906, and the work of reconstruction as specified in the affidavit of said Corcoran was the reconstruction work done under my immediate supervision and control in the said City of Pomona and at the said cost of $6,716.48. The said work of reconstruction was not in any manner necessary for any purpose of the complainant.

On or about February 20th, 1904, being about ready to commence the estimate of said reconstruction work, that is to say, cover-

ing the removal of the poles and wires and system of the complainant from Second Street, in the City of Pomona, I took the specifications, blue-line prints showing all work to be done, to Pomona, and in company with H. Keyser and Frank Smith saw W. H. Poston in the front part of his store, said Poston being at that time President of the Board of Trustees of the City of Pomona. One S. C. Slanker, the Street Superintendent of Pomona, came into said store shortly after our arrival. I said to the said Poston: "Please look at this map and specifications and see if they are satis-
279 factory." The said Slanker and the said Poston looked over the said map and specifications and the said Poston said: "I can see no objections; the work as outlined will be a great improvement for the city."

The work of reconstruction was thereupon immediately commenced and diligently carried on until completed on or about the 5th of May, 1904. During the progress of said work the same was done in accordance with the map and specifications hereinbefore referred to in my affidavit, which were shown to the said Poston and the said Slanker. No interference, nor hindrance, nor opposition, of any kind, was shown by the City of Pomona or by any of the officials or employees thereof during the progress of the said work, but on the contrary, the said City of Pomona and the officials thereof assisted the complainant in the performance of said work by indicating at various times various places where the poles should be set and by otherwise facilitating the work so far as lay in their power, and during the progress of the work the said City, through said President of the Board of Trustees, commented upon the excellence of the work that was being done.

S. L. BROSE.

Subscribed and sworn to before me this 16th day of January, A. D. 1906.

[SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone
280 and Telegraph Co. vs. The City of Pomona et al. Affidavit of S. L. Brose. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondent. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of C. J. Corcoran.*]

In the United States Circuit Court of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

C. J. Corcoran, being first duly sworn, deposes and says:

I am over the age of thirty-seven years, and for more than fifteen years last past have continuously been employed by and connected with the Sunset Telephone and Telegraph Company, the com-
281 plainant in the above-entitled action;

For more than seven years last past I have been the Superintendent of the Construction Department of the said complainant; Said complainant is a corporation engaged in the business of maintaining and operating a telephone and telegraph system in the States of California, Washington, Oregon and Nevada.

I am also familiar with the Pacific States Telephone and Telegraph Company, a corporation, and for more than five years last past have also been employed by the said Pacific States Telephone and Telegraph Company in the capacity of Superintendent of Construction of said Company;

The said Pacific States Telephone and Telegraph Company does not own or operate in the State of California any telephone or telegraph lines other than in the City and County of San Francisco and other than a certain submarine cable between the said City and County and Goat Island, in the Bay of San Francisco.

Between the 28th day of February, 1904, and the 5th day of May, 1904, as superintendent of the complainant herein, I caused certain reconstruction work to be done in the City of Pomona, County of Los Angeles, in the State of California, solely at the request of the said city; the said work of reconstruction was not in any manner necessary for any purpose of the complainant, but was done at great cost and expense and trouble to the complainant. The total
282 cost of said work to the said complainant was the sum of $6,716.48, and the said sum of $6,716.48 was actually disbursed by the said complainant in the performance of said work of reconstruction. A detail of the said work of reconstruction is as follows:

1. All of the poles and wires of the complainant on Second Street, between Parcel and Gibbs Streets, and on Gordon Street between

the Alley and Second Street, and on White Avenue, between the Alley and Second Street, were taken down.

2. Poles were set on the south side of the Alley, between First and Second Streets, from Thomas and Parcel Streets. One 60-foot pole was set in the middle of each block for a distributing pole, and 30 and 35 foot poles were set to support an aerial cable and suspension wires. 50 foot poles were set in the said alley between Parcel Street and White Avenue.

3. On the south side of the Alley, bounded by Second and Third and Thomas Streets and White Avenue 60 foot distributing poles and 30 and 35 foot poles for the purpose of carrying an aerial cable were set; 40 foot poles were continued in said alley between Thomas and Parcel Streets.

4. In the Alley between Third and Fourth Streets, from Thomas Street and White Avenue, 45 foot poles were set.

5. On Elizabeth Street, from First to Sixth Streets, 35 foot poles for the purpose of carrying aerial cables were set.

283 6. On the east side of the Alley, bounded by Garey and Thomas Streets and First and Third Streets, 60 foot distributing poles and 30 and 35 foot poles were set for the purpose of carrying a suspension wire and cable; 40 and 50 foot poles were continued in said alley from Third to Fifth Streets.

7. In the Alley bounded by Garey and Louise and First and Fifth Streets, 50 and 60 foot poles were set.

8. From the office of the complainant to the alley and along the alley to First Street, and along First to Elizabeth Street, and along Elizabeth Street to the alley south of Second Street, 150 pair (122 gauge) aerial cable, with an extension of 50 pair cable, were hung to Sixth Street. Multiple wires were extended from the said 50 pair cable to the alley between Third and Fourth and Fourth and Fifth Streets.

9. From the said office, along the alley between Garey and Thomas Streets from First Street to the alley south of Second Street, a 50 pair cable was hung.

10. In the alley bounded by First and Second and Elizabeth and Parcel Streets a 50 pair aerial cable was hung with a 25 pair extension to a distributing pole in the said alley to Thomas and Elizabeth Streets.

11. In the Alley bounded by Second and Third and Elizabeth and Parcel Streets a 50 pair aerial cable was hung with a 25 pair extension.

12. From the said office to the office pole, a 100 pair aerial cable was hung, together with a 50 pair cable along First to Gibbs Street.

284 13. A 25 pair aerial cable was hung from the said office pole on First Street to the double-arm pole in the alley between Garey and Thomas Streets.

All of the said work of reconstruction was done in the most workmanlike and in a first-class manner.

I have read the affidavit of one D. S. Parker in the above-entitled cause, made on the 21st day of November, 1905. About the month of March or April, 1903, I met a person who stated that he was

representing a Telephone Company that was then engaged in constructing lines in the said City of Pomona. The said person stated that his name was "Parker," and it is true that I approached the said Parker. I went to the City of Pomona at that time especially for the purpose of seeing the person representing the said new Telephone Company to make complaint about the interference by said company with the wires of the complainant herein. My object in visiting the said City of Pomona had nothing whatever to do with the removal of the poles and wires of the complainant from the paved portion of Second Street.

It is not true that I, in any manner or wise, either approached or said anything whatever to the said Parker, or any other person representing the said new Telephone Company, or any other Telephone Company, in the City of Pomona, or elsewhere, with regard to making an arrangement by which the complainant might have the joint use of certain poles owned and controlled by the said company.

It is not true that in the said conversation with the said Parker, or in any conversation with said Parker, in the City of Po-
285 mona, or elsewhere, at any time, the said Parker suggested that the complainant allow the said new company the use of certain poles then occupied by the complainant on Ellen Street. No such suggestion was made to me by the said Parker, or by anyone else, and it is not true that I stated it was impossible for the complainant to give the said new company the use of said poles on Ellen Street, for the reason that the said poles were used jointly by the complainant and the said Pacific States Telephone and Telegraph Company; and it is not true that I stated that the said Pacific States Telephone and Telegraph Company was doing the long distance business in the said City of Pomona, and that the complainant was doing the local business; and it is not true that I stated that the use of said poles by a third company would introduce so many complications that the arrangements suggested would be impossible to bring about; nor did I make any statement or use any words of any kind, in any manner suggesting to the said Parker, or to anyone else, in the said City of Pomona, or elsewhere, that the complainant herein was doing the local business and that the said Pacific States Telephone and Telegraph Company was doing the long-distance business in the said City of Pomona, and that the poles in the said City of Pomona were used jointly by the complainant herein and by the said Pacific States Company.

I know that the said Pacific States Telephone and Telegraph Company does no long-distance business, nor any business whatever, in the said City of Pomona, or in the State of California,
286 other than in the City and County of San Francisco.

The facts with reference to the conversation and the meeting which I had with the said Parker are as follows:

In erecting a pole, the company which the said Parker represented had interfered with certain wires of the complainant. I called the attention of the said Parker to the fact that it was entirely unnecessary to interfere with the said wires in order to erect the said pole, and I requested the said Parker to take measures to prevent a recur-

rence of the incident. That was the sole and only purpose for which I had sought an interview with the said Parker. I further, in line with the said purpose, discussed with the said Parker the question of the location of the additional poles of the said new company among the wires of the complainant, and I looked over certain streets in company with the said Parker. On one of the streets where the said Parker proposed to set poles the complainant had, in addition to its local exchange wires, a cross-arm carrying long-distance wires, used for the purpose of transmitting articulate speech or telegraph messages from the said City of Pomona over the lines and wires of the said complainant to other cities and towns in the State of California and to cities and towns in the States of Oregon, Washington and Nevada. I called the attention of the said Parker to the said cross-arm, and impressed upon the said Parker that extra precaution be taken by the said Parker and his employees to
287 prevent any interference with the said long-distance lines of the complainant, and further requested the said Parker that knobs be placed on the sides of any poles erected by him where any wires of the complainant came in contact with the said new poles, and that the wires of the complainant in such cases be attached to knobs in order to make a proper insulation of the same. The said Parker stated to me that my request was entirely reasonable, and agreed, and stated to me that as the poles of the new company which he was setting were taller than the poles of the complainant, the complainant could make arrangements to attach its wires to the said new poles. I informed the said Parker that the complainant and its officers would not care to make any such arrangement.

I am absolutely positive that the name of the Pacific States Telephone and Telegraph Company was not mentioned in the said conversation which I had with the said Parker, and I further state that the said conversation is the only conversation I ever had with the said Parker, or with any other person representing the said new company in the City of Pomona.

C. J. CORCORAN.

Subscribed and sworn to before me this 16th day of January, A. D. 1906.

[SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California.

288 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona et al. Affidavit of C. J. Corcoran. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of D. P. Fullerton.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

D. P. Fullerton, being first duty sworn, deposes and says:

I am over the age of thirty years. For more than thirteen years last past I have been employed by the above-named complain-
289 ant and I am now in the employ of said complainant. For more than two years last past I have been Superintendent of Equipment for the said complainant. Prior to my employment as such Superintendent I was Foreman of Equipment for many years. As such foreman and as such superintendent I have become familiar with and know the lines of the complainant in the State of California and in the States of Oregon, Washington and Nevada.

The said complainant has, in each of said States, equipped its lines at all of its principal exchanges and at many of its smaller offices with telegraph instruments, and to my knowledge telegraph messages have been sent over lines of the complainant for the general public and by the general public for more than thirteen years last past. The said telegraph business has grown as the business generally of complainant has grown. Telegraph messages can be and are sent over lines of the complainant while said lines are being used at the same time for the purpose of transmitting conversations by telephone. Telegraph messages are sent from points within the State of California to other points within the State of California and to points within the States of Washington, Oregon and Nevada, and from points in said States of Oregon, Washington and Nevada to points within the State of California—all over the lines of the complainant. Such messages are sent for the general public and as a part of the general commercial business of the complainant.

290 I also know Pacific States Telephone and Telegraph Company, a corporation. I know that the said Pacific States Telephone and Telegraph Company is not engaged in business in the State of California, other than in the City and County of San Francisco, in said State. I further know that the said Pacific States Telephone and Telegraph Company has no line or lines or any system of telephone or telegraph within the State of California, other than in the said City and County of San Francisco and a certain submarine

cable between the said City and County and Goat Island in the Bay of San Francisco, said cable having for more than five years last past been leased to and being now leased to the complainant.

All the lines of the complainant in the State of California, including those in the County of Los Angeles and in the City of Pomona, are owned and controlled by the complainant.

Telegrams are sent by the complainant over the lines of the complainant by means of the ordinary telegraph instruments, consisting of a key, relay and sounder, and by means of the Morse signals or alphabet.

Telegraph messages received at any of the exchanges of the complainant for subscribers of the complainant at such exchanges are transmitted to such subscribers over the wires of the complainant by means of telephones in advance of written copies of said messages being sent to said subscribers. In some cases the subscribers
291 do without the written copies, receiving instead by telephone the oral communication of the contents of the telegraph messages.

D. P. FULLERTON.

Subscribed and sworn to before me this 16th day of January, 1906.

[SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona et al. Affidavit of D. P. Fullerton. Service of Within Affidavit Admitted this 20th Day of January, 1906, Subject to All Legal Objections and Exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of H. Keyser.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation, etc., et al., Respondents.

292 UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

H. Keyser, being first duly sworn, deposes and says:

I am over the age of thirty years. For more than fifteen years last past I have continuously been and now am in the employ of the complainant in the above-entitled action. I am now and for several years last past have been Manager for the complainant for the County of Los Angeles, in the State of California.

I also know Pacific States Telephone and Telegraph Company, a corporation; said Pacific States Telephone and Telegraph Company, to my knowledge, does no telephone or telegraph business in the State of California, other than in the City and County of San Francisco, in said State.

I am familiar with the contentions that have arisen between the City of Pomona and the complainant.

On the 25th day of October, 1903, I telephoned from the City of San Bernardino, where I then was, to W. H. Poston, the then President of the Board of Trustees of the City of Pomona, to ask the said Poston what action, if any, had been taken by the Board of Trustees of the City of Pomona regarding the application of the complainant for permission to set poles and string wires on the streets and alleys of the City of Pomona for the purpose of extend-
293 ing the system of the complainant and of accommodating persons who had put in applications for telephones in the said City of Pomona. For some months prior to that time the said city had taken the position that the complainant could not set any additional poles and could not string any new wires in said city because it was occupying the streets and alleys of the said city without any franchises from the said city. In the month of May of the year 1903, I had appeared before the said Board and had applied to the said Board for such permission to set new poles and string new wires. The said application, as I was advised, was taken under consideration by the Board, and from time to time I made inquiry of the said President of the Board what action, if any, had been taken in the premises. In pursuance of the inquiries so made by me, I tele-

phoned, as aforesaid, on said 25th day of October, 1903, and in reply was advised by the said President of the Board that the Board of Trustees of the said City of Pomona, relying upon the decision of the United States Circuit Court in the case of the "Sunset Telephone and Telegraph Company vs. The City of Eureka et al.," had decided to recognize the right of the complainant to use the streets of the City of Pomona without a franchise, and that on or about the 23d day of October, 1903, a resolution had been passed by the said Board of Trustees authorizing the Superintendent of Streets of the said city to grant permits to the complainant to erect poles when needing extension of its lines.

I have read the affidavit of S. L. Brose made herein on the 16th day of January, 1906, and I distinctly remember the con-
294 versation had between the said Brose and the said Poston and Slanker, at which Mr. Smith and I were also present in the store of the said Poston on or about the 20th day of February, 1904, and the facts and circumstances, and the said conversation, as recited in the said affidavit of the said Brose, are true and correct.

The complainant now is and for more than fifteen years last past has been doing a telephone and telegraph business in the City of Pomona. In the transaction of its said business, and as a part thereof, and by use of its systems, the complainant transmits and delivers by means of its lines and telegraph and telephone instruments and apparatus connected therewith, messages and communications originating at points and places outside of the State of California and transmitted by and over its lines to points and places within the City of Pomona, and in like manner and by like means transmits like messages and communications originating at points and places within the City of Pomona to points and places outside of the State of California and in the States or Oregon, Washington and Nevada, and also by said lines and like means, instruments and appliances, transmits and delivers messages and communications originating within the City of Pomona to other places within the State of California.

That prior to the 1st day of September, 1905, the complainant had about four hundred subscribers, each having a telephone, connected with the telephone exchange of the complainant in the City of Pomona. That each one of said telephones is connected with
295 the entire system of the complainant and messages are and can be transmitted from each and any one of said telephones over the wires and lines of the complainant to any other telephone in the City of Pomona or in the State of California and to many points and places in the States of Oregon, Washington and Nevada, upon the lines and instrumentalities of the complainant. That each of said subscribers has the right and privilege to telephone any telegraph message to be sent from the City of Pomona by the complainant to any other office of the complainant in the States of California, Oregon, Washington, or Nevada, to the main office of the complainant in the said City of Pomona, said message being there taken down and transmitted over the lines of the complainant by means of telegraph instruments and appliances

and by means of the Morse signals, and telegraph messages from points in the State of California and in the States of Oregon, Washington and Nevada to any of the subscribers of the complainant in the City of Pomona are repeated and delivered to said subscribers by the complainant through the telephones of the said several subscribers, and the same constitute a connected and continual service. When telegrams are received at the office of the complainant in Pomona for subscribers of the complainant, the same are telephoned as aforesaid to the subscribers in advance of their being delivered in writing. In many instances no written copies of such telegrams are delivered to the subscribers accepting such messages as telephoned.

296 On the 1st day of September, 1905, S. C. Slanker, Street Superintendent of the City of Pomona, and R. G. Loucks, the City Attorney of the City of Pomona, commenced to destroy certain lines of the complainant in the said City of Pomona and continued the said work of destruction on the 2d, 5th and 6th days of September, 1905, until enjoined from proceeding with the work of destruction by an order of this Honorable Court. During the month following the said 1st day of September, 1905, the complainant, by reason of the said destruction of its lines by the said Loucks and Slanker and by persons acting by and under their direction and authority, lost about sixty subscribers in the said City of Pomona, and ever since the commencement of this action the business of the complainant in the said City of Pomona, by reason of the said actions of the said Loucks and Slanker in the destruction of the system of the complainant in the City of Pomona, has suffered serious loss and injury, and the number of the subscribers of the complainant in said City of Pomona has fallen off from four hundred to about three hundred and thirty; while prior to the said destruction of the lines of the complainant the number of subscribers of the complainant in said City of Pomona had been constantly increasing.

HOWARD KEYSER.

Subscribed and sworn to before me this 16th day of January, A. D. 1906.

[SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California.

297 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona et al. Affidavit of H. Keyser. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of E. S. Pillsbury.*]

In the United States Circuit Court of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

E. S. Pillsbury, being first duly sworn, deposes and says:

I am an attorney at law, engaged in the practice of my profession in the State of California, and have been such attorney for
298 more than thirty years last past. For more than ten years last past I have been and now am the General Counsel of Sunset Telephone and Telegraph Company, a corporation, complainant in the above-entitled action.

I am familiar with and know the Pacific States Telephone and Telegraph Company, a corporation, and for more than five years last past I have been the General Counsel of the said Pacific States Telephone and Telegraph Company.

The said Pacific States Telephone and Telegraph Company is a corporation organized and existing under the laws of the State of Oregon, for the purpose of transacting a telephone and telegraph business.

That said Pacific States Telephone and Telegraph Company and the said Sunset Telephone and Telegraph Company are entirely distinct and separate corporations. Each of said corporations has its own distinct and separate Board of Directors and officers, that is to say, a President, Vice-President, Secretary, Treasurer, Auditor, and other officers;

The said Sunset Telephone and Telegraph Company operates a telephone and telegraph system in the States of California, Washington, Oregon and Nevada, and in many of the cities and towns of each of said States.

The said Pacific States Telephone and Telegraph Company has no lines and no system in the State of California, and does no business in said State, other than in the City and County of San Francisco, in said State.

299 The Pacific States Telephone and Telegraph Company is the owner of the majority of the shares of the subscribed and issued capital stock of the said Sunset Telephone and Telegraph Company.

For purposes of economical management of said companies, it for several years last past has been the rule of said companies that certain general stationery used by each of said companies should be printed in the name of "Pacific States Telephone and Telegraph Company."

The business of each of said companies is kept entirely distinct and apart and each of said companies receives for itself all moneys paid for services performed by each of them, and separate books are kept for each of said companies.

In about the month of August, 1902, I was informed that the Board of Trustees of the City of Pomona had instructed the Street Superintendent of the said city not to allow the complainant to set or move any poles within the said city, claiming that the complainant was operating and conducting its telephone and telegraph business within the city without an express franchise from the city. A large number of applications to the complainant for telephones by new subscribers had been and were being made and complainant was unable to fill the said orders by reason of the action of the board in refusing to permit it to erect new poles and string additional wires.

On or about the 12th of May, 1903, I went to the City of Pomona to present to the Board of Trustees of the said city the appli-
300 cation of the complainant for permission to erect new and additional poles and to string new wires, so as to accommodate persons who had made applications for telephones, of whom there were a large number. On said day, just prior to the meeting of the Board of Trustees, W. H. Poston, the then President of the Board of Trustees of the said city, requested me to inspect, with him, the poles and wires and the system of the complainant on Second Street, stating to me that Second Street was the main and most important business street of said city. The said Poston and I visited the said Second Street and the said Poston there stated to me in substance and effect that the principal, and practically, the only, reason why the Board of Trustees of said city had refused to grant the complainant permission to extend its system in said city by erecting new poles and stringing additional wires, was that the system of the complainant on said Second Street was not an ornament to the said city, and that the city desired and wished to have the same removed. He stated to me that if the said poles and wires of complainant were taken off Second Street the appearance of said street would be greatly improved and for that reason it would be greatly to the advantage and benefit of the city that such removal be made. He further stated to me that if the said poles and lines and the said system were removed from the said Second Street to some other street in said city there would probably be no further trouble between the city and the complainant, and that the Board of Trustees would grant permits to the complainant to extend its system in the
301 said city by erecting new poles and stringing additional wires, and would not require the complainant to obtain a franchise from the city for the purpose of maintaining and operating its system therein. After spending half an hour or more with the said Poston in inspecting Second Street as aforesaid, the said Poston and I went to the Town Hall, and I then appeared before the Board of

Trustees of said city at a meeting of said Board then and there regularly held.

I explained to the said Board the application of the complainant for permission to erect new poles and string additional wires for the purpose of accommodating new subscribers, and I further stated to the said board that the complainant had in my opinion the right to occupy the streets of the City of Pomona under the laws of the United States, and more particularly under that certain Act of Congress of the United States entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, and also under the laws of the State of California, and more particularly under the provisions of section 536 of the Civil Code of the State of California, and that inasmuch as the complainant was doing an interstate business it could not, under the laws of the United States and under the laws of the State of California—particularly under the so-called "Broughton" Act—be compelled to apply to the city for a franchise. I further stated to said board that the said right of the complainant had been upheld in a certain action en-
302 titled "Sunset Telephone and Telegraph Company vs. City of Eureka et al." said action having been brought in the Circuit Court of the United States, Ninth Circuit, and Northern District of California, and that a written opinion had been delivered and filed in said action by Honorable William H. Beatty, sitting and acting as the Judge of said Court, and I then and there exhibited to said board a true copy of said opinion and left the same with the said board. I further stated to the said board, in effect, that in company with the said W. H. Poston, President of the said Board of Trustees of the said city, I had visited the said Second Street, and, at the request of the said Poston, had inspected the same, and that the said Poston had stated to me that, if the poles and wires and system of the complainant were removed from said Second Street to some other street in the said city—for the reason that the same were considered a blemish upon the appearance of the said street, which was the principal street in the said city—and for the further reason that if the same were removed it would improve the appearance of the city—the Board of Trustees would probably grant permission to the complainant to extend its system in the City of Pomona by erecting new poles and stringing new wires so as to accommodate new subscribers and would not require the complainant, as a condition to the maintenance and operation of its system in Pomona, to obtain a franchise from the said city. I then and there stated to the said board, in substance, that in my opinion the complainant had the legal
303 right to maintain its lead in Second Street and that a removal of the same to another street would entail an expense of several thousand dollars, but that the complainant desired to avoid, so far as it consistently might, all issues between itself and the municipalities wherein it operated; that I greatly regretted the friction which had arisen between the complainant and the City of Pomona and was anxious to allay the same, and that if, by changing its lead from Second Street, all existing differences would be adjusted and

ended, I was willing to have the complainant incur this expense of removal and would undertake that it should be done, if the board would grant the necessary permits for extensions of lines and withdraw its claim that the complainant should apply for a franchise as a condition to thereafter operating its system in said city. I was thereupon told by the board that the matter and offer would be taken under advisement. At the time of making such statement I was authorized and empowered to bind the complainant to make such removal and so advised the said board.

Thereafter, and in October, 1903, I was informed that the said board had passed a resolution, on or about the 23d day of October, 1903, as follows:

On motion and roll-call by the following vote the Street Superintendent be authorized to grant permits to Sunset Telephone Company to erect poles when needing extension of lines.

Ayes: Campbell, Douglas, Lobinger, Poston.

Noes: Miller.

304 I gave instructions to the proper officers of construction that the said work of removal on Second Street and reconstruction should be promptly commenced and completed, upon the passage of said resolution, and because I considered that the passage of the same was an acceptance of my proposition to remove the line from Second Street, so as aforesaid made to said board on said 12th of May.

In the month of February, 1904, I was first advised that the said work of reconstruction and removal on Second Street had not been commenced, and that the said board had passed a resolution notifying the complainant to remove its poles and wires from said Second Street within sixty days from the date of said resolution. Upon the receipt of such information I took the necessary and proper steps to have such work of removal begun forthwith.

I thereupon, on the 10th day of February, 1904, wrote a letter to W. H. Poston, the President of the Board of Trustees of the said city, and mailed the same to him, postage prepaid—a copy of which is hereto annexed and marked Exhibit "A" and made a part hereof. I further state that all the matters contained in said letter were true.

The work of such removal was thereupon, and in pursuance and in consideration of, and in reliance upon, said resolution of October 23, 1903, immediately commenced and such removal and reconstruction were completed at a cost of about the sum of $6,700 to the complainant.

I further state that, in consideration of and in reliance upon the said resolution of October 23, 1903, many new additional
305 poles were set in the said city, and several miles of wire were strung, at a cost of about $1,500, to the complainant; that all of the said work was done in consideration of and in reliance upon the agreement of the said board to recognize the rights of the complainant to occupy the said streets and alleys of the City of Pomona, without securing a franchise from the city therefor, and in further recognition of the rights of the complainant under the said Act of Congress and under the laws of the State of California.

Neither the said city, nor any officer or officers thereof, made any objection to or interfered in any manner or way with the complainant in the performance of all of the herein mentioned work, but, on the contrary, recognized the right of the complainant to perform the said work pursuant of the said resolution of October 23, 1903, and in conformity with the said agreement between the complainant and said Board of Trustees.

By the performance of the said work by the complainant as herein stated, I believe that a contract arose between the City of Pomona and the complainant, whereby the complainant, in consideration of the performance of the said work, as herein stated, acquired the right to maintain and operate its telephone and telegraph system in the City of Pomona without applying to the said city for any franchise therefor.

Some time in the month of August, 1898, a franchise, which had been passed by the said city in August, 1888, had expired, and from the month of August, 1898, until some time in the year 1902,
306 the complainant was operating and conducting its telephone and telegraph system in the streets and alleys of the City of Pomona without any express formal franchise from the city and without the right of the complainant to so conduct its business being in any manner questioned by the said city. During that time the complainant expended in construction work in said city a sum in excess of $10,000. Said construction work consisted of the erection and installation of new poles and the stringing of wires so as to accommodate subscribers of the complainant who desired telephones. The said City of Pomona in no manner or wise objected to the construction by the complainant or to the maintenance or operation of the system of the complainant between the years 1898 and 1902, but, on the contrary, the said city itself, through various officials thereof, used the system of the complainant, and through its proper officials designated the places where the complainant should erect its poles; and the said city during all of said time acquiesced in and consented to the maintenance and operation and the extension of the system of the complainant in said city. The said work was done by the complainant during the time between August, 1898, and 1902, in reliance upon and in consideration of the rights of the complainant to operate and maintain and extend its said telephone and telegraph system in the streets of the City of Pomona under the laws of the United States, particularly under the said Act of Congress of July 24, 1866, and under the laws of the State of California,
307 particularly under the provisions of Section 536 of the Civil Code of said State, and in consideration of and in reliance upon the acquiescence and consent of said city in and to the maintenance, operation and extension of said system in said city.

E. S. PILLSBURY.

Subscribed and sworn to before me this 18th day of January, 1906.

[SEAL.] A. K. DAGGETT,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A" [TO AFFIDAVIT OF E. S. PILLSBURY—LETTER, E. S. PILLSBURY TO W. H. POSTON.]

SAN FRANCISCO, *Feb.* 10, 1904.

W. H. Poston, Esq., President, City Trustees, Pomona, Cal.

DEAR SIR: My attention has just been called to a resolution passed by your Honorable Board on the 6th inst., directing the Superintendent of Streets to notify the Sunset Telephone Company to remove its wires and poles from Second Street, between Parcells and Gibbs Streets, within sixty days: I was surprised to learn of this action because I supposed the work had already been done. When I appeared before your Board last year upon the question of the necessity of the Company to take out a franchise in Pomona, I expressed a willingness on the part of the Company to move off from that part of Second Street, between the streets named, if the legal position of the Company upon the franchise issue was con-
308 ceded, and I then showed an estimate of the expense which must be incurred by the Company in making this change. Afterwards I was advised that upon the decision of the U. S. Circuit Court in the Eureka case, your Board had withdrawn any objection to the occupation of the streets by the Sunset Company in conformity with that decision, and thereupon I requested the Manager of the Company to give instructions for the change upon Second Street, and understood that such instructions had been given. It now turns out, through some misunderstanding in the Construction Department, the work has been delayed. I am plad to advise you, however, that the President of the Company has today given orders for this change to be made immediately.

I offer this explanation because I am anxious to disabuse your minds of any intentional lack of good faith on the part of the Sunset Company, which desires to be at peace with every community in which it does business, and to comply with all reasonable requests of municipal authorities touching the erection and maintenance of its lines.

Very Respectfully,

E. S. PILLSBURY.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona, et al. Affidavit of E. S. Pillsbury. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906.
309 Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs. for Complainant, Union Trust Building, San Francisco.

[*Affidavit of G. P. Robinson.*]

In the United States Circuit Court of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation) etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

G. P. Robinson, being first duly sworn, deposes and says:

I am over the age of thirty years. I am a graduate of the University of Wisconsin, having taken the degree of Bachelor of Science in electrical engineering. For more than nine years last past I have been practicing my profession as an electrical engineer. I have been employed as an electrical engineer by the Wisconsin Telephone Company, the Erie Telephone and Telegraph Company, the Central Union Telephone Company, and for more than two years last past have been in the employ of the complainant
310 as an electrical engineer, more particularly as Traffic Manager of the said complainant, and during all of the times that I have been connected with the complainant I have been and now am its Traffic Manager.

I know Pacific States Telephone and Telegraph Company, a corporation, and I know that the said Pacific States Company does not own or control or operate or maintain any lines either for telephoning or telegraphing in the State of California; other than in the City and County of San Francisco; in said State, and a submarine cable between the City and County of San Francisco and Goat Island, in the Bay of San Francisco—said cable having, during all of said times been leased by the said Pacific States Company to the complainant herein and being now leased to the said complainant. The complainant operates and maintains in its various exchanges in the States of California and in Oregon, Washington and Nevada about 133,553 miles of wire. The said complainant has in use at the said exchanges about 138,741 telephones. The said complainant has 1,283 offices in the said States—of which offices 451 are designated as exchange or gathering stations. The said complainant has in use and is operating and maintaining in its said system 100,486 poles. The said complainant operates and maintains in its said system in the said States 35,054 miles of long-distance or toll wires, that is to say: wires over which messages by telegraph and conversations by telephone are sent between points

separated from each other by long distances. The entire
311 system of the said complainant in all of the said States is connected so that any subscribers in any city or town or place in any one of said States can and do talk with any other subscriber in any other city or town or place in any other State.

The complainant operates and maintains at many of its exchanges and offices in the said several States, including the City of Pomona, in the State of California, telegraph instruments, whereby telegraph messages for some years past have been, and now are, regularly transmitted as a part of the commercial business of the complainant. The complainant conducts a commercial telegraph business in the City of Pomona, in the County of Los Angeles, State of California, and has had, for some years last past, and does now have, and operate, and maintain, a telegraph instrument in its office in the said City of Pomona, by means of which telegraph messages originating at points in the State of California and at points in the States of Oregon, Washington and Nevada, are received over the lines of the complainant at Pomona for persons in Pomona, and by means of which telegraph messages delivered to the complainant in Pomona are transmitted over the lines of the complainant by the complainant to persons at points or places in the State of California or to points or places in the States of Oregon, Washington or Nevada.

Telegraphic messages are daily sent over many of the wires of the complainant at the same time that the said wires are
312 being used for telephoning purposes. Such telegraphic messages can be sent over any of the wires which are a part of the system of the complainant. Any subscriber of the complainant can, if he so desires, have a telegraphic instrument installed in his place of business or residence and connected with the same wire with which the telephone instrument used by such subscriber is connected.

The complainant leases many miles of wire to individuals for telegraphic purposes, which at the same time are used for telephoning.

Complainant has on file, at its office, a schedule of rates fixed annually by the Postmaster-General of the United States for the transmission of telegrams for the Government of the United States and the several departments thereof. Complainant receives messages for transmission from the Government of the United States and from various departments thereof, and the said messages are transmitted and will continue to be transmitted at the said rates fixed by the Postmaster-General of the United States. All such messages of the Government of the United States and of the several departments thereof and of their officers and agents tendered to the complainant for transmission over all or any of its lines are given priority over all other business.

The complainant has been and is now ready and willing, on the application of any officers of the State of California, or of the United States, in case of any war, insurrection, riot or other civil commo-

tion or resistance of public authority, for the prevention or
313 punishment of crime, or for the arrest of persons suspected or charged therewith, to give to the communications of such officers immediate dispatch at the price of ordinary communications of the same length.

In the City of Pomona, in the County of Los Angeles, about thirty-eight subscribers of the complainant receive daily, Sundays excepted, from the complainant daily Weather Bureau reports from the Government of the United States, said reports being transmitted over the lines of complainant and received by the complainant at its offices in the City of Pomona, and from said offices transmitted over the lines of complainant to the said subscribers of the complainant in the City of Pomona.

All messages, whether by telephone or telegraph, over any part of the lines of the complainant from any point on the system of the complainant to any other point on the system of the complainant, in the State of California, or in the State of Washington, or in the State of Oregon, or in the State of Nevada, or from any one point in said State of Oregon, or in the State of Nevada, or from any one point in said States to any other point in any of the other States, are charged and paid for according to a regular schedule of rates for conversations by telephone and for messages by telegraph, established and printed in regular book form by the complainant, a book containing such rates being on file in each office of the complainant; the latest of said books was issued on the 1st day of March, 1903, and in said book the City of Pomona regularly appears,
314 and from said book it can be and is regularly determined at what rates or charges either telegraphic message can be sent or a telephonic conversation can be had from said City of Pomona to any other point or place in the State of California, or to any point or place in the States of Oregon, Washington or Nevada reached by the lines of said complainant herein.

G. P. ROBINSON.

Subscribed and sworn to before me this 16th day of January, 1906.

[SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona et al. Affidavit of G. P. Robinson. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

315 [*Affidavit of Frank Smith.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

Frank Smith, being first duly sworn, deposes and says:

I am over the age of thirty years.

I now am and have been an employee of the complainant in the above-entitled action for more than three years last past. During all of said time I have been and now am the agent of the complainant in the City of Pomona, in the County of Los Angeles, State of California, and have had exclusive charge of all the telegraph and telephone business of the complainant of said city during all of said time.

The said complainant during all of said time has done a telegraph and telephone business in the said City of Pomona. The
316 complainant has now about three hundred and thirty local subscribers in said city; each of said subscribers rents a telephone instrument from the complainant; each of said instruments is connected by means of wires directly with the telephone exchange of the complainant in said city; by means of said wires and instruments telephone conversations are carried on between the said subscribers in said city and by the said subscribers with persons at other places in the State of California, and with persons at places in the States of Oregon, Washington and Nevada; telegraph messages are also sent by means of said instruments and wires and other instruments of the complainant by said subscribers and by the general public to persons, in other towns in the State of California and to persons in places and towns of the States of Oregon, Washington and Nevada, and conversations and the contents of written telegrams are received by means of said instruments and wires by said subscribers and by the general public in Pomona from persons at other places in the State of California, and from persons at places in the States of Oregon, Washington and Nevada.

I have absolutely no connection whatever with, nor am I employed by any other corporation, nor am I in any way connected with the Pacific States Telephone and Telegraph Company, a corporation.

The said Pacific States Telephone and Telegraph Company is not

engaged in any business whatsoever in the said City of Pomona, and to my knowledge is not engaged in any business within the
317 County of Los Angeles. All of the system of the complainant, consisting of local and long-distance poles, arms, insulators, instruments, switch-boards and other telegraph and telephone appurtenances and appliances, operated by the complainant in the County of Los Angeles are owned exclusively by the said complainant. The said system and all the component parts thereof are assessed to the said complainant, and all taxes, State, County and municipal, in the said County of Los Angeles, on said system, and on the said component parts thereof are paid by the complainant. All the moneys collected for all telegraph and telephone service rendered by the complainant in the said City of Pomona, either for telephone conversations had within the said City of Pomona or from the said City of Pomona to points or places within the County of Los Angeles, or within the State of California, or within either of the States of Washington, or Oregon, or Nevada, are collected by me and deposited by me, daily, to the account of the complainant in the American National Bank at Pomona, and deposit tags are sent by me, daily, to the Auditor of the said complainant in the City and County of San Francisco, in the State of California. The said moneys have so been collected by me and deposited as aforesaid ever since I have been employed by the said complainant. The employees of the complainant in the City of Pomona are paid by checks of the complainant drawn on the American National Bank, of Pomona, said checks being similar to the check hereto attached
318 and marked Exhibit "A." The said checks are signed by me as Paymaster.

During all the times that I have been employed by the said complainant there have been issued, at regular intervals, by the said complainant, telephone directories for the said County of Los Angeles, entitled "Telephone Directory, Sunset Telephone & Telegraph Company, Los Angeles County."

Ever since my connection with the complainant, and for some time prior thereto, there has been and now is, in said City of Pomona, a duly and regularly equipped telegraph instrument, and the same has been and is kept up and maintained and operated continuously for the purpose of transmitting telegraph messages from Pomona to other points and places within the State of California and to points and places within the States of Washington, Oregon and Nevada, and for receiving telegraph messages for persons within the City of Pomona from points and places within the State of California and from points and places within the States of Washington, Oregon and Nevada. Ever since my connection with the complainant such telegrams have been sent and received, and are being regularly and continuously sent and received by complainant over its own wires and a regular commercial telegraph business has always since my connection with the complainant been done by the complainant at Pomona, and is still being done. The said telegrams are sent and received and paid for pursuant to a schedule of rates adopted

by the complainant, and contained in a book published at
319 regular intervals and kept in the office of the complainant at the said City of Pomona and being known as the book of conversation and telegraph rates. The last of said books was issued on the first day of May, 1903, and in said book are published and contained the rates for telegrams and long-distance conversations from the City of Pomona to all the points reached by the lines and the systems of the complainant in the State of California and in the States of Washington, Oregon and Nevada. In said book the City of Pomona is duly and regularly listed the same as any other point or place in the States of California, Oregon, Washington and Nevada reached by the lines of the complainant. The said telegraph instrument, operated and maintained at the office of the complainant in the said City of Pomona, consists of the ordinary key, relay and sounder, and the Morse signals are used in telegraphing.

There has always been, since I have been connected with the said complainant, a regular telegraph operator employed by the said complainant at the said City of Pomona for the purpose of sending and receiving the telegrams over the system and lines of the complainant. As telegrams are received for subscribers of the complainant having telephones, either at their homes or at their places of business, in the said City of Pomona, the contents of the said telegrams are telephoned to the said subscribers in advance of their being delivered in writing. Such has been the practice ever since my connection with the said complainant, and such still is the practice.

320 I have read the affidavit of F. H. Osler, made herein on the 17th day of November, 1905, and I have examined the bills attached to the said affidavit. It is not true that the long-distance telephonic messages, either sent or received by the said Osler, or by any other person, to or from any place without the said City of Pomona, were either charged by or paid to me for the Pacific States Telephone and Telegraph Company. All moneys that have ever been collected by me in the City of Pomona for either telegraph or telephone services rendered to any person in the City of Pomona were collected by me and were paid to me for the account of and on behalf of the said Sunset Telephone and Telegraph Company, the complainant herein.

For purposes of economy, as I was advised by the officers of the complainant, certain stationery, with the name "Pacific States Telephone and Telegraph Company" printed thereon, is used, and has for some years last past been used by the complainant herein. Among said stationery are the billheads for long-distance switches from said City of Pomona. The said billheads are usually attached to a billhead of the complainant for the local rental of instruments by subscribers, and in all cases receipts are given by me on behalf of the complainant alone, and not for the said Pacific States Telephone and Telegraph Company. I never have collected any money or moneys for the said Pacific States Telephone and Telegraph Company.

321 I also have read the affidavit of Robert G. Loucks dated herein on the 21st day of November, 1905. Referring to the map mentioned in the affidavit of the said Loucks, and in the affidavits of John H. Lee and S. N. Curry herein: I gave the said map referred to in the said affidavit of Loucks to R. N. Loucks some time in the year 1902. A number of said maps had been received by me from the Division Manager of the complainant with instructions to distribute the same, said maps being designed purely for advertising purposes. The said map contains all the lines and systems of telegraph and telephone owned by the complainant herein and by the said Pacific States Telephone and Telegraph Company at the time the said maps were printed, and upon said maps are lines of other companies in British Columbia and in Idaho and in Arizona. No separate map of the lines of the complainant was published simply for purposes of economy.

It is not true, as stated in the affidavit of said Loucks that all long-distance telephonic messages were charged by and paid to Pacific States Telephone and Telegraph Company. No long-distance telephonic messages were either charged by or paid to the said Pacific States Telephone and Telegraph Company. All moneys, as heretofore stated by me in this affidavit, which I have ever received or collected in the said City of Pomona for telephone or telegraph services, were collected by me for account and on behalf of the said complainant, including also all moneys collected by me from the said Loucks for any kind of telephonic services rendered to
322 the said Loucks.

It is not true, as stated in the said affidavit of the said Loucks, that the Sunset Telephone and Telegraph Company and the Pacific States Telephone and Telegraph Company have a joint office in the City of Pomona. The Pacific States Telephone and Telegraph Company has no office in the City of Pomona.

It is not true, as stated in the affidavit of the said Loucks, that I am the Manager of the Pacific States Telephone and Telegraph Company at Pomona. The Pacific States Telephone and Telegraph Company does no business whatever at said City of Pomona, and I am not connected with the said Pacific States Telephone and Telegraph Company.

It is not true that I ever stated to the said Loucks that the complainant would either willingly or gladly answer any of the questions of the said Loucks or give the said Loucks the information he desired concerning the complainant and its relations with the said Pacific States Telephone and Telegraph Company. On the contrary, as stated by the said Loucks himself, in his said affidavit, the said complainant and its representatives and attorneys, and I, have at all times absolutely refused to give the said Loucks the information which the said Loucks requested, for the reason that the said Loucks had no right or authority to demand the said information.

It is not true that the poles and wires removed by the Superintendent of Streets of the said City of Pomona belonging to
323 the complainant were those used for purely local telephonic purposes. On the contrary, messages originating at other

points within the State of California and at points without the State of California were being sent over said lines; and in this connection I state that a particular message had been sent over one of the said lines from the said City of Pomona to Carson City, Nevada, the day before the said line was cut by the said Street Superintendent and by the said Loucks, and further, on August 31st, 1905, the day previous to the time when said lines were cut by the said Slanker and Loucks, a conversation was had over one of said lines from Reno, in the State of Nevada, with a subscriber of the complainant in the City of Pomona.

I have read the affidavit of one Geo. W. Ogle herein made on the 17th day of November, 1905; the telegram attached to the said affidavit was duly and regularly received at the office of the complainant in Pomona on the 31st day of August, 1905, from Tacoma, in the State of Washington, over the lines of the complainant in the regular course of its business, and was by complainant regularly delivered to said Ogle.

I have read the affidavit of S. C. Slanker herein, dated November 17th, 1905. The telegram attached to said affidavit was received and delivered in the same manner as the telegram attached to the affidavit of Geo. W. Ogle; the telegram to said Slanker came over the lines of the complainant from Reno, in the State of Nevada.

324 For some time past the complainant herein has furnished, and now furnishes, to about thirty-eight of its subscribers in the said City of Pomona, daily, except Sundays, regular reports from the Weather Bureau of the Government of the United States, received by complainant over its lines at its said office in the said City of Pomona. The said reports are sent to the said subscribers of the complainant over the lines of the complainant to the offices and residences of the said subscribers in the said City of Pomona.

I remember the passage of a certain resolution by the Board of Trustees of the said City of Pomona on or about the 23d day of October, 1903, whereby the said Board of Trustees authorized the Street Superintendent of the said city to grant permits to the complainant whenever the complainant desired to extend its lines for the purpose of accommodating new subscribers. For some time prior thereto an application of the complainant for permission to set new poles and string new wires so as to accommodate new subscribers had been before the said Board of Trustees. After the passage of the said resolution the Superintendent of Streets, one S. C. Slanker, designated to me certain places in the streets and alleys of the said city where poles for the system of the said complainant in the said City of Pomona could be set and after having for a few days made such designations the said Slanker said to me: "Mr. Smith, it is not necessary for you to ask permission to set poles, but go right ahead and set them when you need to do it." In

325 pursuance of, and in reliance upon, said resolution and the action of said Street Superintendent, the complainant has set many new poles and has strung several miles of wires in said City of Pomona for the purpose of accommodating its subscribers.

I further remember that several months after the passage of the said resolution, and in about the month of February, 1904, the question of the removal by the complainant of its poles and wires from Second Street came up again before the Board of Trustees of the said City of Pomona, and the said Board passed a resolution directing the Superintendent of Streets to notify the complainant to remove its said poles and wires. I was well acquainted with W. H. Poston, who was President of the Board of Trustees of the said City of Pomona during the years 1903 and 1904, and had at various times discussed with the said Poston the position of the complainant in the City of Pomona with reference to its use of the streets and alleys of the said city for its telephone and telegraph system without a franchise from the said city. The said President of the Board of Trustees said to me, when discussing the removal of the said poles and wires from the said Second Street, and the reconstruction of that portion of the system of the complainant: "Mr. Smith, when your poles and wires are moved from Second Street there will be no further trouble in regard to the question of your franchise in Pomona"—or words to that effect.

I delivered to the said Loucks the telegram attached to the affidavit of the said Loucks from Richard M. Montague. The
326 said telegram was duly and regularly received at the office of the complainant in Pomona and came over the lines of the complainant from Portland, in the State of Oregon, on August 22d, 1905. It is true that the stationery on which the same is written and the envelope in which the said telegram was enclosed, as well as the stationery and envelopes containing the said telegrams to Ogle and Slanker, are marked "Pacific States Telephone and Telegraph Company," but the said telegraph blanks and envelopes are part of the stationery furnished the complainant herein and used by the complainant, the same as any other stationery used by the complainant.

For more than eight years last past the streets of the City of Pomona, on which are the poles and wires of the complainant, have been and now are letter-carrier routes, and for more than eight years last past there has been and now is a regular collection and delivery of mail matter of the Government of the United States over the said streets by regular mail carriers employed by the Post-office Department of the Government of the United States.

I have read the affidavit of S. L. Brose made herein on the 16th day of January, 1906, and I distinctly remember the conversation had between the said Brose and the said Poston and Slanker, at which H. Keyser and I were also present, in the store of the said Poston on or about the 20th day of February, 1904, and the facts and circumstances, and the said conversation, as recited in the said affidavit of the said Brose, are true and correct.

327 On the 1st day of September, 1905, S. C. Slanker, Street Superintendent of the City of Pomona, and R. G. Loucks, the City Attorney of the City of Pomona, commenced to destroy certain lines of the complainant in the said City of Pomona and continued the said work of destruction on the 2d, 5th and 6th days of

September, 1905, until enjoined from proceeding with the said work of destruction by an order of this Honorable Court. During the month following the said 1st day of September, 1905, the complainant, by reason of the said destruction of its lines by the said Loucks and Slanker and by persons acting by and under their direction and authority, lost about sixty subscribers in the said City of Pomona, and ever since the commencement of this action the business of the complainant in the said City of Pomona, by reason of the said actions of the said Loucks and Slanker in the destruction of the system of the complainant in the City of Pomona, has suffered serious loss and injury, and the number of the subscribers of the complainant in said City of Pomona has fallen off from four hundred to about three hundred and thirty; while prior to the said destruction of the lines of the complainant the number of subscribers of the complainant in said City of Pomona had been constantly increasing.

Ever since my connection with the complainant it has furnished and does now furnish free of charge to the City of Pomona two telephones, connected with the exchange or office of the complainant in said City of Pomona; one of said telephones is in the City
328 Hall of said City, and the other is at the Fire Hall; both of said telephones are in daily use by said city.

FRANK SMITH.

Subscribed and sworn to before me this 17th day of January, 1906.

[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A" [to AFFIDAVIT of FRANK SMITH—FORM of PAY CHECK].

Pay Check No. —, Series B.

Sunset Telephone and Telegraph Company.

Pay to the order of —— —— $—,— dollars.

—— ——,
Paymaster.

My signature is attached below as endorsement of the check and as receipt for the amount in full settlement for services to date hereof.

—— ——, *Employee.*

On the reverse side of the Exhibit "A" are the following words:

First Endorsement on Other Side.

[Stamped across face of check: "Not over One Hundred Dollars ($100)."]

329 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Tele-

phone and Telegraph Co. v. The City of Pomona et al. Affidavit of Frank Smith. Service of within Affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of Louis Glass.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco, ss:

Louis Glass, being first duly sworn, deposes and says:

I am over the age of fifty years. I am an officer, to wit: Vice-President and General Manager of the Sunset Telephone and
330 Telegraph Company, the above-named complainant; have been such Vice President and General Manager for more than five years last past. Ever since the incorporation of the said complainant I have been connected with the said complainant as an officer thereof.

I am also familiar with the Pacific States Telephone and Telegraph Company, a corporation organized and existing under the laws of the State of Oregon.

John I. Sabin, the late President of the complainant, died on or about the 10th day of October, 1905, since the death of said Sabin no president has been elected for the complainant.

The complainant is a corporation engaged in the business of telephoning and telegraphing, and maintains and operates systems of telephone and telegraph in the States of California, Oregon, Washington and Nevada, and the complainant does a regular commercial telephone and telegraph business in and between each of the States of California, Oregon, Washington and Nevada.

The said Pacific States Telephone and Telegraph Company is a corporation engaged in the business of telephoning and telegraphing. The said Pacific States Telephone and Telegraph Company has no lines or systems in the State of California, and does no business in the State of California other than in the said City and County of San Francisco. It is the owner of a submarine cable between the

City and County of San Francisco and Goat Island in the Bay of San Francisco, which, for more than five years last past, has
331 been and now is leased to the said complainant.

The Pacific States Telephone and Telegraph Company owns no property and pays no taxes on any property in the State of California, other than upon the property owned by it in the City and County of San Francisco, in said State.

The complainant has over 130,000 telephones in use in the various states in which it does business. It owns and operates over 35,000 miles of long-distance circuits, said circuits being used for telephoning and telegraphing. The complainant has about 133,000 miles of wire used in connection with its entire system. All of the lines of the complainant connect with the principal cities and towns and places in the States of California, Nevada, Oregon and Washington. The said complainant has about 1,200 offices on the Pacific Coast which are connected with the entire system of the complainant, and over which the complainant does a telephone and telegraph business between cities and towns within each of the herein mentioned States and other cities and towns in said States and cities and towns in each of said other States.

More than 6,000 messages a month are transmitted over the long-distance lines of the complainant from and to the State of California to and from the States of Oregon, Washington and Nevada. About sixteen per cent (16%) of these messages are by telegraph. Telegrams may be, and are, daily, sent over the lines of the complainant without in any manner interfering with the telephone busi-
332 ness which is being done at the same time over the said lines.

All of the long-distance lines of the complainant are equipped with the usual telegraph instruments, consisting of the ordinary key, relay and sounder, and the telegraph business done by the complainant is done in the usual way: i. e., by means of the Morse signals.

The business of telegraphing conducted by the complainant is aided by the local telephone exchanges, in the various cities and towns (including the City of Pomona), operated and conducted by the complainant in receiving and delivering telegrams.

There is absolutely no arrangement or understanding of any kind or nature whatsoever between the complainant and either the Western Union Telegraph Company or the Postal Telegraph-Cable Company, or between either of said companies and the complainant, whereby the complainant has agreed with either of said companies in any manner or wise not to transmit telegrams or written messages of any kind, but the complainant is a competitor with each of said companies.

The business of the Pacific States Telephone and Telegraph Company and the business of the complainant are entirely separate and distinct, and each department of each of the said companies is run and managed separate and apart from each department of the other company. Separate books for the record of the transactions of the various departments of each of said companies are kept. The Pacific

States Telephone and Telegraph Company is the owner of
333 a majority of the shares of the capital stock of the complainant. Whenever, for purposes of economic management of the affairs of said two companies, the said companies can co-operate such co-operation is had. In this connection it has been found expedient, for several years last past, and a matter of useful economy, for both companies to use, so far as possible, the same stationery. To this end, for many purposes, one set of stationery is printed, bearing the name "Pacific States Telephone and Telegraph Company," the said stationery, however, being used by both of said companies. The telegraph blanks used by each of said companies, notices of calls known as the "Please Come," and certain billheads used by each of said companies, and other stationery used by said companies, and the book of rates for conversation and telegraph rates, bear the name of the said Pacific States Telephone and Telegraph Company, but each of said companies contributes ratably toward the expense of supplying and furnishing the said stationery and books used by it. Each of said companies prints all the stationery and books used exclusively by it, such as all checks, deposit tags, directories, blanks for accident reports, vouchers, etc., etc.

On the 14th day of December, 1897, the complainant accepted, without reservation, all of the terms of the Act of Congress of July 24, 1866, referred to in paragraph II of the bill of complaint herein, and ever since the last-mentioned date has accepted and does now
accept and will continue to accept all telegrams between the
334 several Departments of the Government of the United States, and their officers and agents, tendered to it for transmission over all and any of its lines, at rate annually fixed and to be fixed by the Postmaster-General of the United States, and ever since the last-mentioned date the complainant has always given and will continue to give all and any of such messages or any such message priority over all other business.

The complainant has on file in its office, for the information of its various officers and agents in the transaction of telegraph business for the Government of the United States, a schedule of rates entitled: "Schedule of Rates for Government Telegrams," issued annually by the Postmaster-General of the United States. In this connection I hereby state that there are thirty-eight exchanges or offices of the complainant in the said State of California alone at which messages for the Government of the United States transmitted over the lines of the complainant in the State of California either originate or terminate, and messages are received and transmitted for the Government of the United States, at rates fixed by the Postmaster-General of the United States, at every office of the complainant at which the same are tendered.

At the City of Pomona the complainant has, prior to the commencement of this action, supplied, and still continues to supply, over its lines, to more than thirty-five individual subscribers in the City
of Pomona, free of charge, daily Weather Bureau reports re-
335 ceived by the complainant over its lines from the proper official of the Government of the United States.

Since about the month of August, 1898, until the present time,

complainant has been maintaining and operating its telephone and telegraph system in the City of Pomona without any special formal franchise from the said city, but since about the month of August, 1898, the complainant has been so maintaining and operating its said telephone and telegraph system under the laws of the United States and under the laws of the State of California.

From about the month of August, 1898, until the beginning of the year 1902, the complainant was so maintaining and operating its said system in the City of Pomona under the laws of the United States and of the State of California with the consent and without any opposition or hindrance of any kind from the said city or from any member of the Board of Trustees thereof or from any officer thereof. Between about the month of August, 1898, and the beginning of the year 1902, in consideration of and in reliance upon the consent of the said city to the maintenance and operation of the system of the complainant in the City of Pomona under the laws of the United States and of the State of California, the complainant made large and extensive improvements and additions to and increases of its said system in said City of Pomona, and to that end expended for purposes of construction of its system in said City of Pomona more than the sum of $10,000. The City of Pomona, through its proper
336 officers and agents, assisted complainant in making said extensions between the month of August, 1898, and the beginning of the year 1902, by designating and pointing out, through its proper officers, to the complainant, the places where in the streets of said city the poles of the complainant should be set and the wires of the complainant should be strung. Said extensions and additions were necessary to accommodate new subscribers of the complainant in said city.

The said complainant, in reliance upon the said consent of the city to the maintenance, operation, extension and enlargement of its system in the said City of Pomona, during said last-mentioned period of time, expended the said sum of money in making said enlargements and extensions. During the year 1902, the said city, through its City Attorney, upon application being made by the complainant for permission to make further extensions of its system in said City of Pomona for the purpose of accommodating new subscribers of the complainant, took the position that the complainant had no right to maintain or operate or extend its system in said city without a franchise therefor being obtained from the said city.

During the years 1902 and 1903 various applications of the complainant to make such extensions to the system of complainant in said city were taken under advisement by the said city. E. S. Pillsbury, the General Counsel of the complainant, informed the complainant, in the month of May, 1903, that he had, at a meet-
337 ing of the Board of Trustees of said city, on or about the 12th day of May, 1903, stated to said Board, on behalf of complainant, that, if the said city would permit the complainant to make extensions to its system in said city, recognizing the right of the complainant to maintain and operate its telephone and telegraph system in said city without obtaining a franchise from said city, the complainant would as desired by said city, remove its poles and wires

from Second Street, in said city, and reconstruct the same on some other street or streets, said Second Street being the principal business street in said city, and said city claiming that the removal of said poles and wires from Second Street would improve the appearance of said street and of said city. In the month of October, 1903, the said city passed a resolution authorizing the Street Superintendent of said city to grant permits to the complainant for extending its system in said city when needed. Thereafter, in the month of February, 1904, the said city passed a resolution directing the Street Superintendent to notify complainant to remove its poles and wires from Second Street, in said city. In consideration of the passage of said resolution of October, 1903, the complainant immediately caused its poles and wires to be removed from Second Street and to be reconstructed and placed in various other streets at an expense to the complainant of more than the sum of $6,700. Said work was completed early in May, 1904, and said work was done under the superintendent
338 and to the satisfaction of the Board of Trustees and the proper officers of the City of Pomona. Said work by complainant was done in reliance upon and in consideration of the recognition by the said City of Pomona of the rights of the complainant to maintain and operate its telephone and telegraph system in the said city without a franchise.

The question of removing the system of the complainant from said Second Street had arisen in April, or May, 1903, and the complainant objected to going to the large expense of removing said system and of reconstructing the same on some other street or streets in said city until the said city had agreed to recognize the rights of the complainant to maintain and operate its system in said city without a franchise from the city. It would have been an idle and useless act for the complainant to have removed and reconstructed its said system at such large expense only to have the same subject to being removed by the city under the contention of the city that complainant had no right to maintain and operate its system in the city without a franchise.

LOUIS GLASS.

Subscribed and sworn to before me this 18th day of January, 1906.

[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona et al. Affidavit of
339 Louis Glass. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building San Francisco.

[*Affidavit of F. W. Eaton.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco ss:

F. W. EATON, being first duly sworn, deposes and says:

For more than ten years last past I have been and now am the Secretary and Treasurer of Sunset Telephone and Telegraph Company, the complainant in the above-entitled action.

340 I am also the Secretary and Treasurer of Pacific States Telephone and Telegraph Company, a corporation, and have been such for more than five years last past.

I receive and have charge of the funds of each of said corporations.

The Pacific States Telephone and Telegraph Company derives no revenue in the State of California other than from the operation of its system in the City and County of San Francisco and from the lease of a certain submarine cable between the said City and County and Goat Island in the Bay of San Francisco to complainant herein.

All the telephone and telegraph business done by either of said companies in the State of California, other than in the City and County of San Francisco, is done by the above-named complainant.

Separate books are kept by me for each of said corporations, as Secretary and Treasurer thereof, and all receipts by the said complainant are delivered to me and are deposited by me to the credit of the complainant at various banks.

Daily remittances are made to me for the business done by the complainant all over the State of California, including the City of Pomona, in the County of Los Angeles, and elsewhere.

F. W. EATON.

Subscribed and sworn to before me this 18th day of January, 1906.
[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

341 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona, etc. Affidavit of F. W. Eaton. Service of within affidavits admitted this 20th day

of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attys. for Complainant, Union Trust Building, San Francisco.

[*Affidavit of E. J. Zimmer.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California,
City and County of San Francisco ss:

E. J. ZIMMER, being first duly sworn, deposes and says:

I am over the age of thirty-eight years and for more than fifteen years last past have continuously been connected with the
342 Sunset Telephone and Telegraph Company, a corporation.

For more than five years last past I have been connected with the Pacific States Telephone and Telegraph Company, a corporation.

I am an officer, to wit: the Auditor, of each of said companies.

Each of said companies is a corporation engaged in the business of telephoning and telegraphing.

The said Sunset Telephone and Telegraph Company operates a telephone and telegraph system in the States of California, Oregon, Washington and Nevada, and in most of the cities and towns thereof.

The said Pacific States Telephone and Telegraph Company is a corporation organized and existing under the laws of the State of Oregon, and does no business in the State of California, other than in the City and County of San Francisco, in said State. The said Pacific States Telephone and Telegraph Company does not now own or use, and never has owned or used, any long-distance lines in the State of California, other than a certain submarine cable between said City and County of San Francisco and Goat Island in the Bay of San Francisco, said cable being leased to the complainant.

Each of said companies is entirely distinct and separate from the other and the business of each of said companies is kept entirely distinct, separate and apart from the business of the other.

Each of said companies has a separate Board of Directors and separate officers, that is to say: each of said companies has its own

President, Vice-President, Secretary and Treasurer, General
343 Manager and other officers.

Separate books of account and corporations books, as well as all other books pertaining to every branch of the business of each of said corporations are separately kept for each of said corporations.

The business of neither of said corporations conflicts in any wise or form or manner with the business of the other, nor is the business of either of said corporations in any manner, wise or form, mixed up or confused with the business of the other.

The receipts by each of said corporations for business done by each of said corporations are kept entirely distinct, separate and apart.

Separate dividends are paid by each of said companies from the earnings received by each of said companies.

I have read the affidavits of F. H. Osler and Robert G. Loucks herein; all moneys paid by said Osler and by said Loucks for local as well as for long-distance telephone service, as per bills attached to each of said affidavits, were received by the complainant herein, and no part of said moneys was received by or credited to Pacific States Telephone and Telegraph Company. No property is assessed to the Pacific States Telephone and Telegraph Company, and it pays no taxes in the State of California, other than in the City and County of San Francisco, for the reason that it owns no property in said State other than in said city and county. The complainant pays taxes, local, County and State, on its property in every County of the
344 State of California and in many counties of the States of Oregon, Washington and Nevada.

About one-third of the receipts of the complainant are from toll-line or long-distance telephone and telegraph messages sent over the lines and system of the complainant from points in the State of California to other points in said State and from and to points in said State to and from points within the States or Oregon, Washington and Nevada. About sixteen per cent (16%) of the messages transmitted by the complainant over its lines and system from and to the State of California to and from the States of Oregon, Washington and Nevada are telegrams. Long distance telephone and telegraph messages have for some years last past, been regularly sent over the lines and system of the complainant to and from subscribers of the complainant in Pomona from and to other persons in the State of California and from and to persons in the States of Oregon, Washington and Nevada and as a part of the regular commercial telephone and telegraph business of the complainant. For several years last past I have received, and do now continue to receive, daily reports from Frank Smith, the agent of the complainant at Pomona, of the local and long-distance business done by the complainant at Pomona.

E. J. ZIMMER.

345 Subscribed and sworn to before me this 18th day of January, 1906.

[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona et al. Affidavit of E. J. Zimmer. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of C. M. Seeley.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

346 UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

C. M. Seeley, being first duly sworn, deposes and says:

For more than fifteen years last past I have been and now am employed by the complainant in the above-entitled action; for about five years last past I have been and now am the City or District Manager for said complainant in the County of Los Angeles, State of California.

I have read the affidavit of Mrs. Gertrude Warren, dated herein on the 1st day of December, 1905. I know the said Mrs. Gertrude Warren, and it is not true, as stated in her affidavit, that in the middle of the year 1900 the Pacific States Telephone and Telegraph Company came into part management of the main office of complainant in the City of Los Angeles. I know that the Pacific States Telephone and Telegraph Company does not operate or maintain or conduct any telephone or telegraph business in the City of Los Angeles or in the State of California, other than in the City and County of San Francisco, in said State. I did ask the said Mrs. Gertrude Warren for information in regard to the amount of local work in the south office of the complainant in the City of Los Angeles, as compared with the toll-line work of said office, for the purpose of making a proper charge of the work, inasmuch as the cost and expenses of the said work — divided, and such portion as properly belongs to the City of Los Angeles being charged to the office in said city, and such
347 portion as belongs to the toll-lines being charged to the toll-lines. Said toll-lines, however, are operated, owned and controlled by the complainant.

The statement of the said Mrs. Warren to the effect that I informed her that the work of the office was evenly divided between the Pacific States Telephone and Telegraph Company and the Sunset Telephone and Telegraph Company, and that they were compelled to and did keep two salary books, and that one-half of the salaries of all employees engaged in ticket work were paid by the Pacific States Telephone and Telegraph Company, and that the other half of salaries of said employees was paid by the Sunset Telephone and Telegraph Company, is absolutely and entirely false. There never have been kept two salary books or time books, and there never has been any division of the salaries, as stated in said affidavit of Mrs. Gertrude Warren. I never gave to the said Mrs. Warren any information nor made any statement to her regarding two companies. The complainant alone has always conducted, operated and maintained all of the telephone and telegraph business in the City of Los Angeles, with which I have in any manner been connected.

Certain stationery is used by the complainant bearing the name "Pacific States Telephone and Telegraph Company." This, I have always understood, was for the purpose of the economical management of the affairs of the complainant and of the Pacific
348 States Telephone and Telegraph Company.

C. M. SEELEY.

Subscribed and sworn to before me this 19th day of January, 1906.

[SEAL.] R. W. DARBY,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona et al. Affidavit of C. M. Seeley. Service of within affidavit admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attys. for Complainant, Union Trust Building, San Francisco.

No. 1719.

C. F. Curry, Secretary of State. J. Hoesch, Deputy.

STATE OF CALIFORNIA,
DEPARTMENT OF STATE.

I, C. F. Curry, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Articles of Incorporation of Sunset Telephone and Telegraph Company with the certified copy of the original now on file in my
349 office, and that the same is a correct transcript therefrom, and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, the 15th day of January, A. D., 1906.

[SEAL.]

C. F. CURRY,
Secretary of State,
By J. HOESCH, *Deputy.*

Articles of Incorporation of the Sunset Telephone and Telegraph Company.

Know all men by these presents:

That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California, and we hereby certify:

First: That the name of said corporation is, Sunset Telephone and Telegraph Company.

Second: That the purposes for which it is formed are, to purchase, construct, lease, or otherwise acquire, and to hold, operate, maintain, lease, sell or otherwise manage or dispose of all kinds of telegraphic and telephonic rights, patents, licenses, franchises, lines, instruments, sub-marine or other cables, machinery, wires, poles, materials, apparatus and other property appertaining to the telegraph or telephone business; to deal in all kinds of telephonic, telegraphic and electrical materials and supplies, and to contract for the construction,
350 maintenance and sale of all kinds of telegraphic, telephonic and electrical systems and apparatus; to receive, transmit and deliver telegraphic and telephonic messages for hire, and generally to do and perform all kinds of telegraphic and telephonic business, private or public, and everything pertaining thereto; to do a general district and local telegraph and messenger business in various cities and towns in the State of California and elsewhere; to construct, maintain and operate in cities and towns, and elsewhere, telephonic and telegraphic lines connecting the houses and offices of subscribers with its central or branch offices, and to connect such offices, towns or other places by telephonic and telegraphic wires; to acquire, hold and dispose of shares and interests in the capital stock and other property of other corporations, and to acquire and hold real estate for the purposes of its business, with power to sell, lease, or otherwise dispose of the same; to purchase, sell, lease and acquire any and all kinds of property pertaining to the purposes and objects of said corporation, and generally to do and perform all other acts and things which may be deemed necessary or proper to establish and carry on said business in the States of California, Oregon, Nevada, and the Territories of Washington, Utah and Arizona and elsewhere.

Third: That the place where its principal business is to be transacted is the City and County of San Francisco, in the State of California.

351 Fourth. That the term for which it is to exist is fifty (50) years.

Fifth. That the number of its Directors or Trustees shall be seven (7), and that the names and residences of those who are appointed for the first year are:

Names.	Residences.
George S. Ladd,	San Francisco, California.
John I. Sabin,	San Francisco, California.
Louis Glass,	San Francisco, California.
William G. Oliver,	San Francisco, California.
Monroe Greenwood,	San Francisco, California.
Percy T. Morgan,	Berkeley, California.
David Gage,	Oakland, California.

Sixth. That the amount of its capital stock shall be three millions (3,000,000) dollars, divided into thirty thousand (30,000) shares of the par value of one hundred (100) dollars each.

Seventh. That the amount of said capital stock which has been actually subscribed is one hundred thousand (100,000) dollars, and the following are the names of the persons by whom the same has been subscribed, and the amounts thereof, respectively, to wit:

Names.	No. of shares.	Amount.
George S. Ladd,	Two Hundred and fifty	$25,000
John I. Sabin,	Two Hundred and fifty	$25,000
Monroe Greenwood,	Two Hundred and fifty	$25,000
Louis Glass,	One Hundred	$10,000
William G. Oliver,	Fifty	$5,000
Percy T. Morgan,	Fifty	$5,000
David Gage,	Fifty	$5,000

352 Eighth. And we hereby certify to these additional facts, viz.: the kind of telegraph and telephone lines intended to be constructed under these Articles is electro-magnetic, with all modern appliances and improvements, and the places from and to which said lines are intended to be built, and all the intermediate branches thereof, are as follows:

(1) From the City of Modesto, in the County of Stanislaus, to the City of Bakersfield, in the County of Tulare.

(2) From the City of Sacramento, in the County of Sacramento, to Chico, in the County of Butte, by way of Marysville.

(3) From Woodland, in the County of Yolo, to Red Bluff, in the County of Tehama, by way of Colusa, and all necessary intermediate lines; all these in addition to such lines as may be purchased and leased.

(4) In the cities or towns hereinbefore named, and in other cities or towns in the State of California, and in their vicinity, and elsewhere out of said State, to run wires radiating from the offices of the corporation to the various houses and buildings occupied by its customers, for the purpose of transmitting and receiving telegraphic and telephonic communications, or other signals, and for the connection of such wires with each other, or with the wires on main routes, as heretofore described, and with such as may be purchased, leased, or otherwise acquired.

353 Ninth. The length of all the lines hereinbefore described to be built is estimated to be one thousand (1,000) miles.

Tenth. That at least ten (10) per cent of said capital stock subscribed, to wit, the sum of ten thousand (10,000) dollars has been paid in cash for the benefit of said corporation to William G. Oliver, the Treasurer of this intended corporation, and who has been elected as such by the subscribers thereof.

In witness whereof, we have hereunto set our hands and seals this 25th day of April, A. D. 1889.

GEO. S. LADD. [SEAL.]
JNO. I. SABIN. [SEAL.]
MONROE GREENWOOD. [SEAL.]
LOUIS GLASS. [SEAL.]
WM. G. OLIVER. [SEAL.]
PERCY T. MORGAN. [SEAL.]
DAVID GAGE. [SEAL.]

Signed and sealed in the presence of
HOLLAND SMITH.

STATE OF CALIFORNIA,
City and County of San Fraccisco, ss:

On this twenty-fifth day of April, A. D. one thousand eight hundred and eighty-nine, before me, Holland Smith, a Notary Public in and for said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared George S. Ladd, John I. Sabin, Monroe Greenwood, Louis Glass, William G. Oliver, Percy T. Morgan and David Gage, known to me to be the persons described in and whose names are subscribed to the annexed
354 instrument, and they severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my Official seal at my office in the City and County of San Francisco, the day and year last above written.

[NOTARIAL SEAL.] HOLLAND SMITH,
Notary Public, 37 Montgomery Street, San Francisco, Cal.

[Endorsed:] Filed in the Office of the County Clerk of the City and County of San Francisco, State of California, this 26th day of April, A. D. 1889. Wm. A. Davies, County Clerk. By John H. Harney, Deputy Clerk.

I, Wm. A. Davies, County Clerk of the City and County of San Francisco, State of California, hereby certify the foregoing to be a full, true and correct copy of the original Articles of Incorporation of Sunset Telegraph and Telephone Company, filed in my office on the 26th day of April, A. D. 1889.

Attest my hand and my official seal, this 26th day of April, A. D. 1889.

[SEAL.] WM. A. DAVIES,
County Clerk.
By JOHN H. HARNEY,
Deputy County Clerk.

18311.

[Endorsed:] Filed in the Office of the Secretary of State, the 27th day of April, A. D. 1889. W. C. Hendricks, Secretary of State. By H. B. Davidson. Record Book, 63, Page 18.

355 [Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona et al. Certified Copy. Articles of Incorporation of Sunset Telephone and Telegraph Co. Service of within articles of Incorporation admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs. for Complainant, Union Trust Building, San Francisco.

[*Acceptance by Sunset Telephone and Telegraph Company of Act of July* 24, 1866.]

POSTOFFICE DEPARTMENT,
WASHINGTON, D. C., *December* 30, 1905.

I, George B. Cortelyou, Postmaster-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In Testimony Whereof I have hereto set my hand, and caused the seal of the Postoffice Department to be affixed, at the City of Washington, the day and year above written.

[SEAL.] GEO. B. CORTELYOU,
Postmaster-General.

G. G. T.

356 To all whom it may concern:

Be it known, That the Sunset Telephone and Telegraph Company, a corporate body organized under the laws of the State of California through its duly authorized officers, whose signatures are hereunto attached, does hereby accept, without reservation, all of the restrictions and obligations of the Act of Congress approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes." And the said company does especially agree that telegrams between the several Departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster-General.

This declaration of acceptance is made in order that said Sunset Telephone and Telegraph Company may be entitled to the rights and privileges granted by the Act of Congress aforesaid.

Done at San Francisco, California, this fourth day of December, 1897.

(Signed) SUNSET TELEPHONE AND TELEGRAPH COMPANY,
[SEAL.] By JNO. I. SABIN,
President.
Attest:
F. W. EATON,
Secretary.

[Endorsed:] 125. Acceptance by The Sunset Telephone and Telegraph Company of the obligations and restrictions of the
357 Act of Congress approved July 24, 1866. Date: Dec. 4th, 1897. Received Dec. 14, 1897. Address of Company: Telephone Building, 216 Bush Street, San Francisco, California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona, et al. Certified Copy Acceptance by the Sunset Telephone and Telegraph Co. of the obligations and restrictions of the Act of Congress approved July 24, 1866. Service of within Acceptance, etc., admitted this 20th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solc'r. for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Resolutions Passed October* 23, 1903, *by Board of Trustees of City of Pomona.*]

Passed on the 23d day of October, 1903. On motion and roll-call by the following vote, the Street Superintendent be authorized to grant permits to Sunset Telephone Company to erect poles when needing extension of lines.

Ayes—Trustees, Campbell, Douglass, Lobingier, Poston.

Noes—Trustee Miller.

Absent—None.

358 I, A. N. Harris, City Clerk of the City of Pomona, hereby certify the foregoing to be a true and correct copy of a resolution and order of the Board of Trustees of the City of Pomona, as the same appears of record in my office and I further certify that the same was passed by the vote above set forth, and that the same was passed at an adjourned regular meeting of said Board of Trustees held on Friday, the 23d day of October, 1903.

In witness whereof, I have hereunto set my hand as Clerk as aforesaid, and affixed the seal of said City of Pomona, this 19th day of January, 1906.

[SEAL.]

A. N. HARRIS,
City Clerk of the City of Pomona.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona et al. Certified Copy of Resolution of Oct. 23, 1903. Received copy of the within certified copy, this 20th day of Jan. 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, San Francisco, Cal. Willoughby Rodman, Los Angeles, Cal., Solicitors for Complainant.

359 [*Affidavit of Wallace Everson.*]

In the United States Circuit Court of the Ninthh Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

Wallace Everson, being first duly sworn, deposes and says:

I am an officer, to wit: the President, of Pacific Surety Company, a corporation.

On the 7th day of January, 1901, one George Washington Gates applied to the said corporation to furnish a bond in the sum of $500 for the said Gates to Sunset Telephone and Telegraph Company, a corporation, the complainant in the above-entitled action, for the faithful performance by the said Gates of his duties as Manager of said complainant at the City of Pomona, in the County of Los Angeles, State of California.

In the month of October, 1902, the said Gates, as Manager of the office of the complainant at the said City of Pomona, mis-
360 appropriated funds of the complainant.

The said Gates was thereupon discharged from the employ of the complainant, and the said Pacific Surety Company was obliged to, and did, pay to the complainant, under the said bond, the sum of $51.25.

The bond of the said Gates with the Pacific Surety Company was thereafter canceled.

WALLACE EVERSON.

Subscribed and sworn to before me this 26 day of January, 1906.
[SEAL.] I. WEININGER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed:] Original. No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona, et al. Affidavit of Wallace Everson. Rec'd. a copy of within affidavit admitted this 30th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Sole'r. for Respondents. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs. for Complainant, Union Trust Building, San Francisco.

361 [*Affidavit of E. J. Zimmer.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation) etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California, City and County of San Francisco, ss:

E. J. Zimmer, being first duly sworn, deposes and says:

I am the E. J. Zimmer who made an affidavit herein on the 18th day of January, 1906. I have read the affidavit of G. W. Gates made herein on the 16th day of December, 1905. The said Gates was employed by the complainant between the year 1897 and the month of October in the year 1912. In the month of October, 1912, the said Gates was discharged from the service of the complainant because the said Gates had misappropriated funds of the complainant which he had collected for the complainant. The said Gates was never employed at any place by the Pacific States Telephone and Telegraph Company in any capacity whatsoever.

362 I know the map mentioned and referred to in the said affidavit of the said Gates, said map being the same map that is mentioned and referred to in the affidavit of S. N. Curry made herein on the 17th day of November, 1905, and in the affidavit of John H. Lee made herein on the 16th day of November, 1905, and in the affidavit of Robert G. Loucks, made herein on the 21st day of November, 1905, each of which said affidavits I have read. The said map was made in the year 1901, and about three thousand copies of said map were made and were, under my directions, distributed by the various local Managers of the complainant, throughout the States of California, Oregon, Washington and Nevada, solely and purely for purposes of advertising. The said map contained the lines and systems of telegraph and telephone of complainant herein and of the Pacific States Telephone and Telegraph Company at the time that the said map was printed. The said map was originally printed by and at the expense of the Pacific States Telephone and Telegraph Company, but the complainant contributed its share of the cost and expense of printing said map.

As Auditor of the complainant, for some years last past I have instructed, and do now instruct, the various agents and employees of the complainant throughout the State of California and in the States of Washington, Oregon and Nevada, to keep separate accounts of the long-distance business done by the complainant, including telegrams and long-distance telephone messages, and of the local

telephone business done by the complainant. For more than four years last past the records of the long-distance messages
363 transmitted by the complainant—including both telegraphic and telephonic—have been and are recorded and kept on blanks bearing the name of the Pacific States Telephone and Telegraph Company, and the record of the local exchange business of the complainant has been and is kept on blanks bearing the name of the complainant. The reports made by the said Gates, referred to in the affidavit of the said Gates, of long-distance business and made by him on blanks of Pacific States Telephone and Telegraph Company, were of the long-distance business of the complainant and were not of any business of the Pacific States Telephone and Telegraph Company.

Complainant does a large and extensive business with the Postal Telegraph-Cable Company and separate collections are not made by the complainant from the said Postal Telegraph-Cable Company at each office of the complainant in the States of California, Washington, Oregon and Nevada, but the said Postal Telegraph-Cable Company pays to the complainant fixed charges for the services rendered by the complainant to the said Postal Telegraph-Cable Company covering the entire system and all the exchanges and offices of the complainant at which the complainant renders services to the said Postal Telegraph-Cable Company, including the exchange and office of the complainant at Pomona; and the said Postal Telegraph-Cable Company pays to the complainant its charges for all services rendered the said Postal Telegraph-Cable Company by the complainant at Pomona and elsewhere.

364 The complainant for more than four years last past has advertised, and does now advertise, in its regular directories including the directories advertised, and does now advertise, in its regular directories issued for the County of Los Angeles, and by other means, the fact that it is doing a general commercial telegraph business, and during all of said times has instructed, and does now instruct, all its agents and employees to accept all the telegrams whenever offered to them for transmission over the lines of the complainant.

For more than four years last past the complainant, as a part of its regular commercial telephone and telegraph business, has accepted from the general public, at its various offices in the States of California, Oregon, Washington and Nevada, including its office at the City of Pomona, money for transmission by telegraph or telephone to any office or exchange of the complainant in said States.

E. J. ZIMMER.

Subscribed and sworn to before me this 27th day of January, A. D. 1906.

[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

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[Endorsed:] Original. No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona et al. Affidavit of E. J. Zimmer. Rec'd a copy of within affidavit admitted this 30th day of January 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solc'r for Respondents. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.
365 Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

[*Affidavit of Frank Smith.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation) etc., et al., Respondents.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Frank Smith, being first duly sworn, deposes and says:

I am the Frank Smith who made an affidavit herein on the 17th day of January, 1906.

I have read the affidavit of G. W. Gates made herein on the 16th day of December, 1905.

It is not true, as stated in the affidavit of said Gates, that the complainant has four long-distance telephone pole lines in Pomona. The complainant has eight long-distance circuits in Pomona, over which telephone and telegraph messages can be and are constantly being sent by the general public to and from the various
366 points on the telephone and telegraph system of the complainant in the States of California, Oregon, Washington and Nevada.

It is not true, as stated in the affidavit of the said Gates, that the lines of the complainant in the City of Pomona, other than the long-distance lines mentioned by the said Gates, are used exclusively for local telephone business. Each of the subscribers of the complainant in the City of Pomona can, by means of the telephone instrument at his residence or place of business, and by means of the telephone and telegraph system of the complainant, communicate by telephone with any person at any point in the State of California or in the State of Oregon, Washington or Nevada, at which the complainant has an office or telephone, and any of the said subscribers of the complainant at Pomona can likewise telephone to the office of the complainant at Pomona and have transmitted by the complainant and telegraphic message which any such subscriber desires to have sent to any point in the State of California or in

the States of Oregon, Washington or Nevada reached by the system of the complainant, and telegraphic messages received by complainant at Pomona from any point in the State of California or in the States of Oregon, Washington and Nevada, over the lines of the complainant, can be telephoned to any subscriber of the complainant at Pomona at his place of residence or at his place of business.

Ever since I have been Manager of the complainant in the said City of Pomona, that is to say, since the month of December, 1902, subscribers of the complainant in said City of Pomona have,
367 at various times, held conversations from their places of residence or places of business, by means of the telephone instrument of the complainant and by means of the telephone and telegraph system of the complainant, with persons at other points in the State of California and in the States of Oregon, Washington and Nevada, and at said City of Pomona have transmitted to and received from persons at other points in the State of California and to and from persons at points in the States of Oregon, Washington and Nevada, written telegraphic messages over the lines of the complainant by telephoning such messages to the office of the complainant at Pomona for transmission to persons at such other points, and by receiving such messages from persons at such other points, over the telephone from the said office of the complainant.

FRANK SMITH.

Subscribed and sworn to before me this 30th day of January, 1906.

[SEAL] WILLIAM L. ELDER,
Notary Public in and for the County of Los Angeles, State of California.

368 [Endorsed:] Original. No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona, et al. Affidavit of Frank Smith. Rec'd Copy of Within Affidavit Admitted this 30th Day of January, 1906, Subject to all Legal Objections and Exceptions. Robert G. Loucks, Sol'c'r for Respondents. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant. Union Trust Building, San Francisco.

369 [*Affidavit of C. W. Hinchcliffe.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
Territory of Arizona, County of Pima, ss:

C. W. Hinchcliffe, being first duly sworn, deposes and says:

For many years, to wit: for more than ten years next prior to June, 1904, I was employed by the above-named complainant; for about six years I was the Division Manager of the complainant in the above-entitled action in the State of California, having control of the business of the complainant in the southern part of the State of California, including the County of Los Angeles.

I know Pacific States Telephone and Telegraph Company, a corporation, and I have never at any place been in any way employed by said Pacific States Telephone and Telegraph Company.

370 I have read the affidavit of G. W. Gates made herein on the 16th day of December, 1905. The said Gates was employed by the complainant between the years 1897 and 1902. In the month of October, 1902, the said Gates was discharged from the service of the complainant because the said Gates had misappropriated moneys belonging to the complainant and collected by him for the complainant.

The maps referred to in the affidavit of the said Gates were maps showing generally the lines of the complainant and of the Pacific States Telephone and Telegraph Company. The said maps were printed for purposes of advertising, and I was informed by officers of the complainant in about the year 1901 or 1902, when the said maps were printed, that the same were printed in the name of the Pacific States Telephone and Telegraph Company for purposes of economy and that for the same reason certain general stationery used by each of said companies was also printed in the name of the Pacific States Telephone and Telegraph Company.

I know that the Pacific States Telephone and Telegraph Company does no business in the State of California other than in the City and County of San Francisco in said State, and owns no lines or poles nor any system in said State other than in said City and County.

It is not true that I said to the said Gates, or to anyone else, that a telegraph instrument would be installed for the purpose of attending to and handling the complainant's own business at Pomona

371 so as to save using time on the telephone lines, or words to that effect, or of any similar import. The said telegraph instrument which was installed at the exchange of the complainant in the said City of Pomona was installed by the complainant for the purpose of doing a general commercial telegraph business, and the said complainant, for some years last past, has, to my knowledge, installed such telegraph instruments in various of its exchanges, and the said complainant to my knowledge does a regular telegraph business between points within the State of California, including the City of Pomona, and from and to points in the State of California to and from points in the State- of Oregon, Washington and Nevada.

C. W. HINCHCLIFFE.

Subscribed and sworn to before me this 29th day of January, 1906.

[SEAL.] JOOST H. SCHNEIDER,
Notary Public in and for the Territory of Arizona, County of Pima.

My commission expires Febr. 25th, 1906.

[Endorsed:] Original. No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona. Affidavit of C. W. Hinchcliffe. Rec'd a copy of within affidavit admitted this 30th day of January, 1906, subject to all legal objections and exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Jan. 30,
372 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Sol'rs for Complainant, Union Trust Building, San Francisco.

Copy of Tax List of Sunset Telephone and Telegraph Company for the Year 1904.

Phones:
Sunset Red 1071.
Home 2222.

A. N. Harris, Clerk.
T. R. Trotter, Deputy.

The City Clerk's Office, City Hall, East Third Street.

POMONA, CAL., *Jan'ry 29th,* 1906.

Franchises (describe them in detail)	14.00
14 Miles Telephone lines, wires and poles	14.00
Telephone Boxes, 482	36.15
Switchboard, Battery and etc	3.00
Office fixtures	.50
	67.65

Assessment Book of the property of City of Pomona for the year 1904-5 P. 2.

Personal Property Tax.

Sunset Tel. & Tel. Co., Value of Personal Property exclusive of money	67.65	
Total value of all property after deductions	67.65	$118.40

When Paid, 6/11/04.

I, A. N. Harris hereby certify that I am the City Clerk, of the City of Pomona, County of Los Angeles, State of California. As such City Clerk I am custodian of the assessment books and tax
373 lists of the City of Pomona, and said assessment books and tax lists are in my custody. I hereby certify that the foregoing copies of portions of the assessment books and tax lists, of the City of Pomona, are true and correct copies of the originals as shown by the records of my office.

In witness whereof I have hereunto set my hand as City Clerk, as afoesaid, and have hereunto affixed the seal of the City of Pomona, this 29th day of January, 1906.

[SEAL.]

A. N. HARRIS, *City Clerk,*
By T. R. TROTTER, *Deputy Clerk.*

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern Division of California. Sunset Telephone and Tele-

graph Co. v. The City of Pomona et al. Certified Copy of Tax List. Received Copy of within this 5th Day of February, 1906. Copy delivered to the Solicitor for Respondents in open court. Filed Feb. 5, 1906. Wm. M. Van Dyke, Clerk. Pillsbury, Madison & Sutro, Union Trust Bld., San Francisco, Solicitors for Complainant.

374 *Copy of Tax List of Sunset Telephone and Telegraph Company for the Year* 1905.

Phones:
Sunset Red 1071.
Home 2222.

A. N. Harris, Clerk.

T. R. Trotter, Deputy.

The City Clerk's Office, City Hall, East Third Street.

POMONA, CAL., *January 29th,* 1906.

Franchise		14.00
Telephone boxes, 405		30.37
14 Miles Telephone lines, wires and poles		14.00
Switchboard, Battery, etc		3.00
Office Furniture and Fixtures		.50
		61.87

Assessment Book of the property of City of Pomona for the year 1905-6, P. 246.

Per Property.

Sunset Tel. & Tel. Co., Value of Personal Property exclusive of money	61.87	
Total value of all property after deductions	61.87	$102.09

When Paid 5/22/05.

I, A. N. Harris, hereby certify that I am the City Clerk, of the City of Pomona, County of Los Angeles, State of California. As such City Clerk I am custodian of the assessment books and tax lists of the City of Pomona, and said assessment books and tax lists are in my custody. I hereby certify that the foregoing copies of por-
375 tions of the assessment books and tax lists, of the City of Pomona, are true and correct copies of the originals as shown by the records of my office.

In witness whereof I have hereunto set my hand as City Clerk, as aforesaid, and have hereunto affixed the seal of the City of Pomona, this 29th day of January, 1906.

[SEAL.]

A. N. HARRIS, *City Clerk,*
By T. R. TROTTER, *Deputy Clerk.*

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. v. The City of Pomona et al. Certified Copy of Tax List. Received Copy of within this 5th Day of February, 1906. Copy de-

livered to the Solicitor for Respondents in open court. Filed Feb. 5, 1906. Wm. M. Van Dyke, Clerk. Pillsbury, Madison & Sutro, Union Trust Bld., San Francisco, Solicitors for Complainant.

376 [*Affidavit of W. E. Dunn.*]

In the United States Circuit Court of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) et al., Respondents.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

W. E. Dunn, being first duly sworn, deposes and says as follows, to wit:

I am and for more than five years last past have been an attorney and solicitor and counsel of complainant inthe above-entitled cause. During five years last past I have appeared before the Board of Trustees of the City of Pomona, on behalf of said complainant, and have stated to said Board the position, rights and claims of said complainant in regard to its use of the streets of the City of Pomona. Each time I appeared before said board, I stated to said board that complainant had and claimed the right to use said streets without obtaining the consent of the City of Pomona to its use of said streets, and without obtaining any franchise from said city. On
377 each occasion I stated that complainant based its claim upon an Act of Congress, approved July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same," and upon the laws and statutes of the State of California, especially Section 536 of the Civil Code of California, and that certan statute known as the "Broughton Act." I never stated that complainant based its right upon the aforesaid laws of California alone, but in each case stated that complainant claimed the aforesaid right under the aforesaid Act of July 24th, 1866.

During five years last past I have had several consultations with Robert G. Loucks, City Attorney of the City of Pomona, concerning the rights and claims of complainant to use the aforesaid streets. I always stated to said Loucks that complainant based its claim upon the aforesaid Act of July 24, 1866, and upon the aforesaid laws and statutes of the State of California.

W. E. DUNN.

Subscribed and sworn to before me this 30th day of January, 1906.

[SEAL.] C. E. FISH,
Notary Public in and for Los Angeles Co., Cal.

[Endorsed:] Original. No. 1209. U. S. Circuit Court, Ninth Judicial Circuit. Southern District of California, Southern Division. Sunset Telephone and Telegraph Co. vs. The City of Pomona, et al. Affidavit of W. E. Dunn. Received copy of the within affidavit this 30th Day of January, 1906, Subject to all objections and
378 exceptions. Robert G. Loucks, Solicitor for Respondents. Filed Feb. 5, 1906. Wm. M. Van Dyke, Clerk. Pillsbury, Madison & Sutro, Union Trust Bldg., San Francisco, Cal., Solicitors for Complainant.

[*Affidavit of B. C. Carroll.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
Northern District of California, State of California,
City and County of San Francisco, ss:

B. C. Carroll, being first duly sworn, deposes and says:
At the dictation of Mr. E. S. Pillsbury, the General Counsel of Sunset Telephone and Telegraph Company, complainant herein, I wrote the original letter, of which Exhibit "A" to the affidavit of E. S. Pillsbury made herein on the 18th day of January, 1906, is a copy. It is my recollection that the said letter was written on a letter-
head which bore the name "Pacific States Telephone and
379 Telegraph Company." I have been employed in the office of the said E. S. Pillsbury for more than five years last past. I hereby state that for about five years last past all letters written by me for the said E. S. Pillsbury and signed by the said E. S. Pillsbury for the Sunset Telephone and Telegraph Company, the complainant in the above-entitled action, and for Pacific States Telephone and Telegraph Company, have been and are written on letterheads, either bearing the firm names, "E. S. Pillsbury," also "Pillsbury, Madison & Sutro," or the name "Pacific States Telephone and Telegraph Company." A copy of the said letter to said Poston was made, and copies of all of said letters are made, by means of a sheet of carbon paper upon paper without any heading, the same as that attached to this affidavit and marked Exhibit "A."

B. C. CARROLL.

Subscribed and sworn to before me this 31st day of March, 1906.
[SEAL.]
FLORA HALL,
Notary Public in and for the City and County of San Francisco, State of California.

(Sheet marked Exhibit "A" annexed.)

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone and Telegraph Co. vs. The City of Pomona, etc. Affidavit of B. C. Carroll. Filed May 14, 1908. Wm. M. Van Dyke, Clerk. Pillsbury, Madison & Sutro, for Complainant, Union Trust Building, San Francisco.

380 [*Affidavit of E. S. Pillsbury.*]

In the Circuit Court of the United States in and for the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), etc., et al., Respondents.

UNITED STATES OF AMERICA,
Northern District of California, State of California,
City and County of San Francisco, ss:

E. S. Pillsbury, being first duly sworn, deposes and says:

The copy of the letter to Mr. W. H. Poston, dated February 10, 1904, attached to the affidavit made by me herein on the 18th day of January, 1906, and marked Exhibit "A," is a full, true and complete copy of said letter as said copy exists in the files of my office, and I have no other copy of said letter. The copy of said letter which I kept was a duplicate copy written on paper the same as that attached to this affidavit and marked Exhibit "A" by means of a sheet of carbon paper and is known as a carbon copy. It is my recollection that the letterhead on which the original letter was written bore the name "Pacific States Telephone and Tele-
381 graph Company." For about five years last past I have used, as General Counsel of the complainant herein, and as General Counsel of the Pacific States Telephone and Telegraph Company, one form of stationery on which, as also on letter-heads bearing the firm names "E. S. Pillsbury" also "Pillsbury, Madison & Sutro," I have written all letters for the Sunset Telephone and Telegraph Company, the complainant, and the said Pacific States Company. The said stationery is part of the general stationery used by each of said companies. I have no objection to the filing in this cause, as a part of the record thereof, of the original letter from myself to W. H. Poston, dated February 10, 1904. The said letter was written by me, as General Counsel for the Sunset Telephone and Telegraph Company, the complainant in the above-entitled action, and the said letter was not written for, and had nothing whatever to do with, Pacific States Telephone and Telegraph Company. The said letter was signed by me after having been dictated by me in my office to B. C. Carroll, and after having been transcribed by the said Carroll.

E. S. PILLSBURY.

Subscribed and sworn to before me this 30th day of March, 1906.

[SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

(Sheet marked Exhibit "A" annexed.)

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Judicial Circuit, Southern District of California. Sunset Telephone &
382 Telegraph Co. vs. The City of Pomona et al. Affidavit of E. S. Pillsbury. Filed May 14, 1906. Wm. M. Van Dyke, Clerk. Pillsbury, Madison & Sutro, Sol'rs. for Complainant, Union Trust Building, San Francisco.

[*Evidence on Behalf of Defendants.*]

Articles of Incorporation of the Pacific States Telephone and Telegraph Company.

Know all men by these presents; That we, John C. Ainsworth, John Lawrence, J. H. Thatcher, George B. Bush, and F. R. Strong, do hereby associate ourselves as a corporation under the general incorporation laws of the State of Oregon, and do hereby adopt the following Articles of Incorporation.

Article I.

The name of this corporation shall be "Pacific States Telephone and Telegraph Company," and the duration of the same shall be perpetual.

Article II.

That the purposes for which this corporation is formed are: To purchase, construct, lease, or otherwise acquire, and to hold, operate, maintain, lease, mortgage, hypothecate, pledge, sell, or otherwise manage or dispose of, all kinds of telegraphic and telephonic rights, patents, licenses, franchises, lines, instruments, submarine or other cables, machinery, wires, poles, materials, conduits, apparatus, and all other property appertaining to the telegraphic or tele-
383 phone business or to the transmission of intelligence in any form by the aid of electricity; to deal in all kinds of telephonic, telegraphic and electrical materials and supplies, and to contract for the construction, purchase, maintenance, lease, mortgage, pledge and sale of all kinds of telegraphic, telephonic and electrical systems, lines, apparatus, exchanges and appurtenances, to receive, transmit and deliver telegraphic and telephonic messages and communications for hire, and generally to do and perform any and all kinds of telegraphic and telephonic business, private or public; to purchase, lease acquire, and make use of, any and all means for the transmission of signals or intelligence of any kind by electricity, and everything pertaining thereto, and to mortgage, pledge, sell, or

otherwise dispose of the same; to do a general district and local telegraph and messenger business in various cities and towns in the State of Oregon, and in any other State or Territory within the United States of America, or in any of its possessions or elsewhere; to construct, maintain and operate in cities and towns and elsewhere telephonic and telegraphic lines, systems and exchanges connecting the houses and offices of subscribers with its central or branch offices and exchanges, and to connect such offices, exchanges, towns or other places by telephonic and telegraphic wires, and use the same for the transmission of messages and communications; to purchase, acquire, hold, hypothecate, pledge, sell and dispose of shares and interests in the capital stock of other corporations and other personal property, and to acquire and hold real estate for
384 the purposes of its business, with power to sell, lease, mortgage, hypothecate, pledge, or otherwise dispose of the same; to purchase, sell, lease, mortgage, pledge and acquire any and all kinds of property pertaining to the purposes and objects of said corporation, and generally to do and perform all other acts and things which may be deemed necessary or proper to effect said purposes and to establish and carry on said business, or any of its branches, in the State of Oregon and in the various States and territories of the United States, and elsewhere.

Article III.

The principal office of this Company shall be at the City of Portland, in the county of Multnomah and State of Oregon.

Article IV.

The capital stock of this Company shall be Fifteen Million Dollars ($15,000,000.00).

Article V.

The Capital Stock of this Company shall be divided into One Hundred and Fifty Thousand (150,000) shares, and the par value of each shall be One Hundred ($100.00) Dollars.

In witness whereof, We have hereunto set our hands and seals to these Articles in Triplicate, at Portland, Oregon, on this 8th day of May, A. D. 1900.

JOHN C. AINSWORTH. [SEAL.]
JNO. LAWRENCE. [SEAL.]
J. H. THATCHER. [SEAL.]
GEORGE B. BUSH. [SEAL.]
F. R. STRONG. [SEAL.]

385 STATE OF OREGON,
County of Multnomah, ss:

Be it remembered, That on this 10th day of May, A. D. 1900, before me the undersigned, a Notary Public of the State of Oregon, duly commissioned and sworn, came John C. Ainsworth, John Law-

rence, J. H. Thatcher, George B. Bush, and F. R. Strong, all to me personally known to be the persons named in and who executed the foregoing Articles of Incorporation, and severally acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year first hereinabove written.

[SEAL.] C. M. CHAMBREAU,
Notary Public for Oregon.

(10¢ I. R. Stamp canceled.)

[Endorsed:] Articles of Incorporation of the Pacific States Telephone and Telegraph Company. Filed in the office of the Secretary of State of the State of Oregon, for Record at eight o'clock A. M., the 11th day of May, 1900, and recorded on page 81 of Book 13 of Records of Articles of Incorporation of private corporations. F. I Dunbar, Secretary of State.

386 UNITED STATES OF AMERICA,
State of Oregon:

OFFICE OF THE SECRETARY OF STATE.

I, F. I. Dunbar, Secretary of State of the State of Oregon, and Custodian of the Seal of said State, do hereby certify that the foregoing is a true copy of the Articles of Incorporation of the Pacific States Telephone and Telegraph Company, and the endorsements thereon, as the same is taken from and compared with the original filed in my office on the 11th day of May, A. D. 1900.

In testimony whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Oregon.

Done at the Capitol, at Salem, Oregon, this 12th day of October, A. D. 1905.

[SEAL.] F. I. DUNBAR,
Secretary of State.

Received copy of the within Articles of Incorporation, this 10 day of November, 1905.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK,
DUNN & CRUTCHER,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Articles of Incorporation of the
387 Pacific States Tel. & Tel. Co. Filed Nov. 11, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3, Union Block, W. 2d St., Pomona, Cal.

[*Designation of Agent by Pacific States Telephone and Telegraph Company.*]

Designation by the Pacific States Telephone and Telegraph Company, a corporation organized and existing under the laws of Oregon, of a person upon whom process may be served in accordance with the provisions of an Act of the Legislature of the State of California, entitled "An Act Amending an Act in Relation to Foreign Corporations," approved March 17, 1899.

Know all men by these presents:

That the Pacific States Telephone and Telegraph Company, a corporation organized, incorporated and existing under the laws of Oregon and doing business in the State of California, hereby designates E. J. Zimmer, residing in the City and County of San Francisco, State of California, as the person upon whom process issued by authority by or under any law of the State of California may be served.

Said designation is hereby made by said corporation with the intention and for the purpose of complying in all respects with the terms of an Act of the Legislature of the State of California entitled, "An Act Amending an Act in Relation to Foreign Corporations," approved March 17, 1899, and is made pursuant to the following resolution which was unanimously adopted at a regular meeting of the Board of Directors of said Pacific States Telephone and
388 Telegraph Company, held at the office of the Company on the 28th day of August, A. D. 1900, at which meeting a majority of the said Board was present and voted, to wit:

"Resolved: That the President and Secretary of the Pacific States Telephone and Telegraph Company be and they are hereby authorized and directed for and on behalf of this corporation, and as its corporate act and deed, to file in the office of the Secretary of State, in and for the State of California, a designation designating E. J. Zimmer, residing in the City and County of San Francisco, State of California, as the person upon whom process issued by authority by or under any law of the State of California may be served; said designation to be made and filed by this corporation with the intention and for the purpose of complying in all respects with the terms of an Act of the Legislature of the State of California, entitled 'An Act Amending an Act in relation to Foreign Corporations,' approved March 17, 1899."

In witness whereof, the said Pacific States Telephone and Telegraph Company has this 4th day of September, A. D. 1900, hereunto caused its name to be signed and its corporate seal to be affixed by its President and Secretary thereunto duly author-
389 ized as aforesaid.

PACIFIC STATES TELEPHONE & TELEGRAPH CO.

[SEAL.]

JNO. I. SABIN, *President.*

J. H. THATCHER, *Secretary.*

No. 3603.

C. F. Curry, Secretary of State. J. Hoesch, Deputy.

STATE OF CALIFORNIA,
DEPARTMENT OF STATE.

I, C. F. Curry, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of Designation of Agent with the original now on file in my office, and that the same is a correct transcript therefrom, and of the whole thereof. Also, that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 25th day of September, A. D. 1905.

[SEAL.] C. F. CURRY,
Secretary of State.
By J. HOESCH, *Deputy.*

390 Received copy of the within Designation of Agent this 10 day of November, 1905.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK,
DUNN & CRUTCHER,
Solicitors for Complainant.

[Endorsed:] 734. Designation by the Pacific States Telephone and Telegraph Company, a corporation, organized and existing under the laws of Oregon, of a person upon whom process may be served in accordance with the provisions of An Act of the Legislature of the State of California, entitled "An Act amending an Act in Relation to Foreign Corporations," approved March 17th, 1899. Department of State, California.

[Endorsed:] Filed in the office of the Secretary of State, the 6th day of September, A. D. 1900. C. F. Curry, Secretary of State. By J. Hoesch, Deputy.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, et al. Respondents. Designation of Agent, by Pacific States Tel. & Tel. Co. Filed Nov. 11, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 and 3 Union Block W. 2d St., Pomona, Cal.

391 [*Annual Report to Secretary of State by Pacific States Telephone and Telegraph Company.*]

Annual Statement—Domestic Corporation.

NOTE.—Read Carefully.

This statement may be executed by any of the officers of the corporation, and must be filed with the Secretary of State during the month of June, and on or before July 1st of each year.

If incomplete or irregular, it cannot be accepted, and will be returned for correction. Annual license fee in proportion to amount of authorized capital stock as follows:

Where total authorized capital stock is not in excess of	$5,000		$10 00
Where total authorized capital stock shall exceed	5,000		
and shall not exceed		$10,000	15 00
Where total authorized capital stock shall exceed	10,000		
and shall not exceed		25,000	20 00
Where total authorized capital stock shall exceed	25,000		
and shall not exceed		50,000	30 00
Where total authorized capital stock shall exceed	50,000		
and shall not exceed		100,000	50 00
Where total authorized capital stock shall exceed	100,000		
and shall not exceed		250,000	70 00
Where total authorized capital stock shall exceed	250,000		
and shall not exceed		500,000	100 00
Where total authorized capital stock shall exceed	500,000		
and shall not exceed		1,000,000	125 00
Where total authorized capital stock shall exceed	1,000,000		
and shall not exceed		2,000,000	175 00
Where total authorized capital stock shall exceed	2,000,000		200 00

392 Annual license fees payable in advance to the State Treasurer and forwarded to him within thirty days from July 15th of each year.

All remittances of annual license fees should be made payable to the State Treasurer and forwarded to him within thirty days from July 15th of each year.

Corporation No. —.

Annual Report to Secretary of State.

The Pacific States Telephone and Telegraph Company, a corporation organized and existing under and pursuant to the laws of the State of Oregon, does hereby make the following report in compli-

ance with the provisions of "An Act to provide for the licensing of Domestic Corporations and Foreign Corporations, Joint Stock Companies and Associations, etc.," approved February 16, 1903:

The name of the corporation is Pacific States Telephone and Telegraph Company.

The location of its principal office is at Number 374 Alder Street, in the City of Portland, in the County of Multnomah, State of Oregon.

The names of the President, Secretary, and Treasurer, with the postoffice address of each, is as follows

393

Names.	Office.	Postoffice Address.
Jno. I. Sabin.....	President	Portland, Oregon.
F. W. Eaton....	Secretary and Treasurer....	San Francisco, Cal.

The date of the annual election of directors and officers the 9th day of February, A. D. 1905.

The amount of authorized capital stock Twenty-five Million ($25,000,000) Dollars.

The number of shares Two Hundred Fifty Thousand (250,000); par value of each share One Hundred ($100) Dollars; the amount of capital stock subscribed Thirteen Million nine hundred sixty-four thousand eight hundred ($13,946,800) Dollars; the amount of capital stock issued Thirteen Million Nine Hundred Sixty-four Thousand and Eight Hundred ($13,964,800) Dollars; the amount of capital stock paid up Thirteen Million Nine Hundred Sixty-Four Thousand Eight Hundred ($13,964,800) Dollars.

In witness whereof, I, F. W. Eaton, Secrteary of said Corporation, have signed this report this 12th day of June, 1905.

[SEAL.] F. W. EATON.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

I, F. W. Eaton, Secretary of the above and foregoing named Corporation, being first duly sworn, depose and say upon oath, that the foregoing statement is a full, true and correct statement of
394 the matters therein contained, according to the best of my information, knowledge, and belief.

F. W. EATON.

Subscribed and sworn to before me this 17th day of June 1905.

[NOTARIAL SEAL.] O. A. EGGERS,
Notary Public in and for the City and County of San Francisco, State of California.

File No. 7303. Annual Report to Secretary of State for the Year 1905 of Pacific States Telephone and Telegraph Company. Principal Office Portland, Oregon, a Corporation organized and existing under and pursuant to the laws of the State of Oregon. Filed June 20, 1905. F. I. Dunbar, Secy. of State.

UNITED STATES OF AMERICA,
State of Oregon:

OFFICE OF THE SECRETARY OF STATE.

I, F. I. Dunbar, Secretary of State of the State of Oregon, and Custodian of the Seal of said State, do hereby certify that the annexed copy of Annual Report, for the year 1905, of the Pacific States Telephone and Telegraph Company, has been compared by me with the original, and that it is a correct transcript therefrom and of the whole of such original as the same is now on file in this office.

In testimony whereof, I have hereunto set my hand and affixed hereto the seal of the State of Oregon.

395 Done at the Capitol at Salem, Oregon, this 19th day of October, A. D. 1905.

[SEAL.]

F. I. DUNBAR,
Secretary of State.

Received copy of within Annual Report this 10 day of November, 1905.

PILLSBURY, MADISON, & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona, et al., Respondents. Annual Report of Pacific States Tel. & Tel. Co. Filed Nov. 11, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 & 3 Union Block, West 2d St., Pomona, Cal.

[*Acceptance of Act of July* 24, 1866, *by Pacific States Telephone and Telegraph Company.*]

POSTOFFICE DEPARTMENT,
WASHINGTON, D. C., *September* 27, 1905.

I, F. H. Hitchcock, Acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original acceptance on file in this Department.

In testimony whereof I have hereunto set my hand and
396 caused the seal of the Postoffice Department to be affixed, at the City of Washington, the day and year above written.

[SEAL.]

F. H. HITCHCOCK,
Acting Postmaster-General.
G. G. T.

To all whom it may concern:

Be it known, That the Pacific States Telephone and Telegraph Company a corporate body organized under the laws of Oregon through its duly authorized officers, whose signatures are hereunto attached, does hereby accept, without reservation, all of the restric-

tions and obligations of the Act of Congress approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes." And the said company does especially agree that telegrams between the several Departments of the Government and their officers and agents shall at all times have priority over all other business in their transmission over the lines of said company, and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster-General.

This declaration of acceptance is made in order that said Pacific States Telephone and Telegraph Company may be entitled to the rights and privileges granted by the Act of Congress aforesaid.

397 Done at Portland, Oregon, this eighteenth day of October, 1900.

PACIFIC STATES TELEPHONE AND TELEGRAPH CO.,
[SEAL.] J. O. AINSWORTH, *Vice President;*
J. H. THATCHER, *Secretary.*

[Endorsed:] 207. Acceptance by the Pacific States Telephone and Telegraph Company of the Obligations and Restrictions of the Act of Congress Approved July 24, 1866. Date: October 18, 1900. Received October 27, 1900. Address of Company: Portland, Oregon. J. O. Ainsworth, Vice-President.

Received copy of within acceptance this 10 day of November, 1905.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, et al., Respondents. Acceptance of Act of 1866 by Pacific States Tel. & Tel. Co. Filed Nov. 11, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 & 3 Union Block, W. 2d St., Pomona, Cal.

398 [*Affidavit of S. N. Curry.*]

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

UNITED STATES OF AMERICA,
State of California,
County of Los Angeles, ss:

S. N. Curry, being first duly sworn, deposes and says: That I am more than twenty-one years of age, and that for more than five years last past have been a resident of the City of Pomona, in the County of Los Angeles, State of California.

That the large map filed herewith, representing five States and one Territory, sized 43″x62″, in the upper right-hand corner being printed, in large one inch red letters, the words "Pacific States Telephone & Telegraph Company"; and in the lower left-hand corner of said map, in large black letters, are printed the words: "Lines of Pacific States Telephone and Telegraph Co. at June 1st 1901," is the map left in the Real Estate Office of Greaser & Curry,
399 in the City of Pomona, on or about the fore part of the year 1902; and that the same was left and given to us by an agent or representative of the Sunset Telephone and Telegraph Company, at Pomona, California; and that said map was in my Real Estate office continually to and up to the 7th day of September, 1905, at which time I gave possession of said map to Robert G. Loucks, City Attorney of said City of Pomona;

That said map so left in my said office, as aforesaid, and also which was given to said Robert G. Loucks, is similar to the map left in the office of Judge John H. Lee, and is from the same print and for the same purpose as the said map of said Judge John H. Lee, and filed by him in connection with his affidavit in this case.

S. N. CURRY.

Subscribed and sworn to before me, this 17th day of November, 1905.

[SEAL.] U. E. WHITE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. In the Circuit Court of the United States, Ninth Circuit. For the Southern District of California, Southern Division. Sunset Telephone and Telegraph Co. a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of S. N. Curry. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 & 3 Union Block, W. 2d St. Pomona, Cal.

400 [*Affidavit of A. N. Harris.*]

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. N. Harris, being first duly sworn, deposes and says:

That he is now, and for more than twenty years last past has been, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That he is now, and has been since the 20th day of April, 1903, the duly elected, qualified and acting City Clerk of said City of Pomona;

That he has read and compared the 16 pages hereto annexed with the originals thereof on file in the office of the City Clerk of said City of Pomona, and that the minutes and resolutions and ordinances herein contained are full, true and correct copies and the same as those duly passed and adopted and contained in the original minutes and records of said City of Pomona; and that the certified copies hereto annexed are true copies of the originals as
401 the same appear on file in the office of the City Clerk of said City of Pomona.

[SEAL.] A. N. HARRIS.

Subscribed and sworn to before me, this 14th day of November, 1905.

J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

[*Minutes of Board of Trustees—Annexed to Affidavit of A. N. Harris.*]

Minutes of a Regular Meeting of the Board of Trustees of the City of Pomona, held Feb. 4th, 1902, as the same appears in Record Book No. 3 of said Board of Trustees, at page 127:

A communication from the Sunset Telephone Co. in reference to placing guy post on Holt Ave. was on motion referred to the City Att'y.

Minutes of an Adjourned Regular Meeting of the Board of Trustees of the City of Pomona, held August 20th, 1902, as the

same appears in Record Book No. 3 of said Board of Trustees, at page 197:

Permission is hereby granted to the Pacific States Telegraph and Telephone Company to remove and change the location of certain of its telegraph and telephone poles and wires on and along First Street in the City of Pomona, in the following manner, to wit:

All the poles and wires now located on the North side of First Street, from the West line of the City of Pomona easterly to the East line of Parcells Street, may be removed to and estab-
402 lished on the South line of said First Street, it being understood that the poles so removed shall be so placed that the outer face thereof shall be on a line eleven and one-half (11½) feet North of the South line of First Street; and the line of poles and wires now located on the North side of First Street between the West line of Gibbs Street and the East line of San Antonio Avenue may be removed to and established on the alley running east and west from Gibbs Street to the East line of San Antonio Avenue, midway between First and Second Streets; and the poles now erected on the North side of First Street from the East line of San Antonio Avenue to the east line of the City of Pomona to the south side of said First Street; also that the said Telephone Company shall have the privilege of laying a cable diagonally across First Street and Garey Avenue in an underground conduit.

Such removal to be made without prejudice to the rights or obligations of said Telephone Co. or the City of Pomona. This permission for the removal and re-establishment shall in no wise be construed as enlarging, admitting or establishing any rights, privileges or franchises of the said Telephone Company, nor as a waiver on the part of the city of Pomona of any right which it may have to deny the authority of said Telephone Company to erect or
403 maintain telegraph or telephone poles or wires in said City of Pomona.

W. H. POSTON,
Pres. Board of Trustees of the City of Pomona.

Witness:
ARZA CRABB,
City Clerk.

Minutes of an Adjourned Regular Meeting of the Board of Trustees of the City of Pomona, held Feb. 25th, 1903, as the same appears in Record Book No. 3 of said Board of Trustees, at page 282:

On motion the City Attorney was instructed to draft an ordinance in conformity with the petition of property owners for removal of all wires for Electric and Telephone use from Second Street.

Minutes of a Regular Meeting of the Board of Trustees of the City of Pomona, held May 5th, 1903, as the same appears in Record Book No. 3 of said Board of Trustees, at page 311:

The request of Mr. Keyser representing the Sunset Telephone Co. that the Co. be allowed to extend the lines of the Co. in the City, to reach applicants for phone service pending the action of the Courts, on the question of the rights of the Co. to operate in this

state, without special franchise, was on motion, taken under advisement.

Minutes of an Adjourned Regular Meeting of the Board of Trustees of the City of Pomona, held February 4th, 1904, as the same appears in Record Book No. 3 of said Board of Trustees at page 447:

404 Moved by Trustee Douglass seconded by Trustee Campbell, the Street Superintendent be instructed to notify the Sunset Telephone and Telegraph Co. to remove all their electric wires and poles on Second Street between Parcells & Gibbs Streets, within a period of sixty (60) days. Carried.

Minutes of Regular Meeting of the Board of Trustees of the City of Pomona, held July 17, 1888, as the same appears in Record Book No. 1 of said Board of Trustees, at page 91:

Moved and Seconded that the petition of certain residents of Pomona asking for a franchise for putting up telephone poles and wires in the City of Pomona be accepted and placed on file. The motion was carried.

To the Honorable Board of Trustees, City of Pomona, Calif.:

We, the undersigned, residents of Pomona, respectfully petition your honorable body, to grant a franchise to the Sunset
405 Tel.-Tel. Co., for the purpose of erecting poles and opening a telephone exchange in this city.

Jas. T. Taylor.	R. S. Bassett.
J. H. Adams.	C. E. Sumner.
E. B. Smith, Son & Co.	W. S. Bailey.
Bingham & Slanker.	Woy Bros.
Jas. Becket.	Ira F. White & Son.
C. S. Kennedy, Agent S. P. Co.	O. Sweet & Co.
F. L. Palmer.	C. P. Brown, Jr.
J. L. King.	R. N. Loucks.
Pomona Pipe Works per Todd.	H. H. Doane.
R. S. Day.	B. F. Whipp.
F. C. Evans.	Jno. L. Overton.
H. B. Martin.	Geo. Rhorer.
J. H. Reynolds.	N. Morris.
S. A. Pease.	C. Lehman.
Robt. Franken.	W. E. Martin.
C. H. Bridges.	J. A. Driffill.
Wm. Haskell.	C. Howe.
H. G. Tinsley.	J. A. Gallup.
Steffa & Pierce.	Geo. L. Henry.
Brown Coats & Garcelon.	Preston J. Tarr.
O. F. Giffin.	M. G. Rogers.
Cohn Bros.	W. M. Woody & Co.
Arza Crabb.	M. A. Rogers, J. L. R.
E. Greenbaum.	Kerckhoff Cuzner M. & L. Co.

[Endorsed]: Petition of Jas. T. Taylor et al. asking for a franchise granting privilege to the Sunset Telephone Co. to erect
406 poles in the City of Pomona for the purpose of opening a Telephone exchange. Filed July 18, 1888. Arza Crabb, Clerk.

[*Communication from Sunset Telephone Company to Board of Trustees—Annexed to Affidavit of A. N. Harris.*]

Board of Trustees of the City of Pomona.

POMONA, CAL., *Feb. 4th,* 1902.

To the Board of Trustees, City of Pomona, Calif., State of Calif.:

On February 3d, 1902, the Sunset Telephone & Telegraph Co. (in order to maintaain in good repair, its lines at the corner of Holt Ave. and Gordon street in the city of Pomona), set a guy pole inside the curb line on Holt avenue in front of the property of Mrs. Ward.

This was simply a removal of a guy from across the street in order to better the condition of the wires and poles at this point.

The above-mentioned guy pole was sawed off on the night of February 3d so as to injure its usefulness.

I ask the board to protect us in this matter and allow me to replace and maintain this guy pole at this point.

If this guy pole is not replaced there is danger of the wires and poles at this corner coming down and causing great damage.

G. W. GATES,
Manager.

407 [Endorsed:] Communication from Sunset Telephone Company. Filed Feb. 4th, 1902. Arza Crabb, City Clerk.

[*Resolution and Notice.—Annexed to Affidavit of A. N. Harris.*]

POMONA, CALIFORNIA, *February 6th,* 1904.

To Sunset Telephone and Telegraph Company, a Corporation, and to Frank Smith, their Agent, at Pomona, California:

You and each of you will please take notice of the passage on February 4th, 1904, of the following resolution by the Board of Trustees of the City of Pomona:

"Moved by Trustee Douglass, seconded by Trustee Campbell, The Street Superintendent be instructed to notify the Sunset Telephone Company to remove all their electric wires and poles now on Second Street, between Parcells Street and Gibbs Street within a period of sixty (60) days.

Carried."

Pursuant to said resolution you and each of you are hereby notified to remove all your electric wires and poles now on Second Street,

between Parcells Street and Gibbs Street, within a period of sixty days from date hereof, or I shall proceed to remove same at your expense.

And you and each of you are further notified to desist from
408 putting or placing new poles and stringing wires on the said portion of Second Street above referred to.

Dated February 6th, 1904.

S. C. SLANKER,
Superintendent of Streets of the City of Pomona.

Received copy of the within Resolution and Notice this 6th day of February, 1904, for the said Sunset Telephone and Telegraph Company.

FRANK SMITH,
Mgr., Agent at Pomona, California.

[Endorsed:] St. Sup't's Order, Ordering Sunset Telephone & Telegraph Co. to Remove their Poles and Wires on Part of 2d St. Filed 10th Feb., 1904. A. N. Harris, City Clerk. Per T. R. Trotter, Dep'y Clerk.

[*Notice by Street Superintendent—Annexed to Affidavit of A. N. Harris.*]

To the Pacific States Telephone and Telegraph Company, a Corporation:

Will you immediately produce and inform me as to what municipal, State or national franchises, rights of privleges, you have to authorize you to do and carry on local, State and interstate, Telephone and Telegraph business in the City of Pomona.

Also will you immediately assist me in designating and locating the poles, wires and apparatus, for any and all purposes owned, used or controlled by said Pacific States Telephone and Telegraph Company within the City of Pomona, so that they may be distinguished and known from the poles, wires and apparatus of the Sun-
409 set Telephone and Telegraph Company within said city, so that there will be no mistake and as little inconvenience as possible to your company and the public, in my proceeding at the present time to remove all the poles, wires and apparatus of said Sunset Telephone and Telegraph Company in accordance with the orders and resolutions of the Board of Trustees of the City of Pomona of date August 1, 1905, and my notice to said "Sunset" company of date August 10, 1905.

Dated at Pomona, Cal., September 4, 1905.

Respectfully,

S. C. SLANKER,
Street Superintendent of the City of Pomona.

Served copy of the above notice this 4th day of September, 1905, on Pacific States Telephone and Telegraph Company, by leaving said copy with Frank Smith, its Manager at Pomona. Cal.

S. C. SLANKER,
Street Supt. of City of Pomona.

[Endorsed:] St. Sup'ts Notice to Pacific States T. & T. Co. Dated Sept. 4, 1905. Filed Sept. 4th, 1905. A. N. Harris, City Clerk. By T. R. Trotter, Deputy City Clerk.

410 *Ordinance No.* 30 [*Annexed to Affidavit of A. N. Harris.*]

An Ordinance of the City of Pomona Granting to the Sunset Telephone - Telegraph Company (a Corporation) the Right to Erect Poles and Telephone Wires Along the Public Streets of said City for a period of Ten Years.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. The Sunset Telephone — Telegraph Company is hereby granted, for the period of ten years from date of passage and approval of this ordinance, the right, and are hereby authorized, to erect and maintain telephone poles and to run wires thereon over and along the public streets and thoroughfares of said city, subject to the provisions, limitations and restriction-, and on the conditions hereinafter contained.

SECTION 2. Poles to be erected for the purpose mentioned in the preceding section shall be placed from one hundred and fifty to one hundred and eighty feet apart but shall not be so placed as to in any manner obstruct or interfere with the free use of any street, alley, or driveway in said city. The outer face of all poles shall be placed within and *and* adjoining the curb.

SECTION 3. Telephone wires shall in all cases be suspended at a distance of at least nineteen feet from the ground, and maintained at that or a greater altitude at all points where wires are placed.

411 SECTION 4. In case it shall at any time become necessary in order to extinguish or prevent fire, or to protect property against loss or injury by fire in said City, to remove any of the poles or wires mentioned in the foregoing sections of this ordinance, the same may be removed by or under the direction of the fire department of said city, and such poles and wires shall be replaced and repaired by said corporation in its discretion, but at its own expense, and no charge shall ever be made against nor claim allowed or paid by said City for any injury to such poles or wires necessarily caused by said fire department, as aforesaid.

SECTION 5. This ordinance is passed and the franchise hereby provided for is granted on the further condition that said City, whenever, in the discretion of its Board of Trustees it shall elect so to do,

shall have the right to use such telephone poles for the purpose of suspending thereon or attaching thereto fire alarm wires, at such reasonable, convenient and practicable point or place of such poles as may be designated by the grantees provided that such fire alarm wire shall be placed in position by or under the direction or supervision of said Telephone - Telegraph Company.

SECTION 6. No private residence, building, or structure in said City shall be used by Telephone - Telegraph Company for the purpose of suspending or supporting any of its telephone wires in said city without permission of the owner of such residence, building, or structure.

412 SECTION 7. This ordinance shall take effect and be in force from and after the date of its publication.

Approved this eighth day of August, 1888.

CHARLES FRENCH,
President of the Board of Trustees.

Attest:
ARZA CRABB,
City Clerk.

Ordinance No. 49 [*Annexed to Affidavit of A. N. Harris.*]

An Ordinance to Prevent Digging Up or Excavating any Portion of Any of the Streets of the City of Pomona without the Permission of the Superintendent of Streets, and Prescribing Rules for Laying Pipes in said Streets.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. It shall be unlawful for any person at any time without the consent in writing of the Superintendent of Streets of the City of Pomona, first had and obtained, to excavate or dig up any portion of any street or alley, in said city, for any purpose whatever. And whenever any person shall excavate or dig up any portion of any such street or alley, under permission, granted or otherwise, no part of such excavation shall be permitted to remain open longer than five days after such excavation was made, but the same shall be filled up, and the streets, sidewalks, alleys, curb, or either wherein such excavation was made, shall be fully and in every respect restored to its former condition by the person making

413 such excavation; and the same so far as affected by such excavation shall be maintained in good repair for thirty days after such excavation shall have been filled up.

Provided that nothing herein contained shall apply to any work in or upon any of the said streets or alleys by said City.

SECTION 2. Whenever any pipe for conducting water or gas among any of the public streets of said city shall be laid by any person, company, or corporation, the same shall be laid as follows, viz: All water pipes shall be laid at a depth of not less than thirty inches below the surface of the street according to the established grade thereof, and in streets one hundred feet wide or over shall be laid not

less than twenty-four feet nor more than thirty feet from the center line of such street, and all gas pipes shall be laid at a depth of not less than two feet below the surface of the street according to such established grade, and in streets one hundred feet wide or over, shall be laid not less than twenty feet and not more than twenty-four feet from such center line.

In streets less than one hundred feet wide and not less than seventy feet wide, such water pipes shall be laid not less than fifteen feet nor more than nineteen feet from the center line of street, and gas pipes thereon shall be laid not less than thirteen feet nor more than fourteen feet from such center line.

In all streets less than seventy feet wide, all water pipes and gas pipes shall be laid not less than eighteen feet from center line of street, and shall be at least twelve feet from property line.

414 Provided that in case any of said pipes shall be laid in any street for which no grade shall have been established prior to the laying of such pipes, water pipes shall be laid at least thirty inches below the natural surface of the street and gas pipes shall be laid at least two feet below such surface and provided further that there shall be a service cock or cutoff on all service pipes connecting with gas and water mains, which shall be placed inside of the curbing front of premises to be supplied, and not more than six inches distant from the inner line of such curb.

SECTION 3. It shall be the duty of all persons who shall make or cause to be made any excavation in any of the streets or alleys of said city, or who in the prosecution of any work or improvements allowed by law therein shall cause any obstruction to the free use thereof, as a public way, to cause to be placed and maintained at such excavation, or other obstruction, during the night time, a single light sufficient to give timely warning to persons passing along such street or alley, of the existence and location of such excavation or obstruction.

SECTION 4. Any person who shall violate any of the provisions of this ordinance, or who shall fail or neglect to comply with the requirements thereof, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than ten dollars nor more than two hundred or by imprisonment for a term not exceeding ten days, or by both such fine and imprisonment.

415 SECTION 5. Ordinance No. 19 of said City, entitled "An Ordinance to Prevent Digging up or Excavating Any Portion of Any of the Streets of the City of Pomona without the Permission of the Superintendent of Streets, and Prescribing rules for Laying Pipes in Said Streets," approved March 28, 1888, is hereby repealed.

SECTION 6. This ordinance shall take effect and be in force from and after its passage and publication according to law.

Introduced May 15, 1889.

Approved and adopted May 22, 1889.

W. M. WOODY,
President of the Board of Trustees.

Attest:

ARZA CRABB,
City Clerk.

Ordinance No. 245 [*Annexed to Affidavit of A. N. Harris.*]

An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful When Committed or Permitted Within the Corporate Limits of the City of Pomona, and Providing Penalties Therefor.

The Board of Trustees of the City of Ponoma do ordain as follows:

SECTION 1. It shall be unlawful for any person not a peace officer, to wear or carry concealed upon or about his person, any firearm, pistol, revolver, dirk, bowie-knife, stiletto; slung-shot, sandclub, or metallic knuckles, or to discahrge or fire any gun or pistol in
416 the City of Pomona, except he first have a written permission so to do, signed by the city marshal. Provided, that should the city marshal refuse to grant a permit to any person who may apply therefor, such person may apply to the Board of Trustees for such permit, who shall have power to grant the same in their discretion.

SEC. 2. It shall be unlawful for any person to engage in the playing of ball on any street or in any public place in the City of Pomona.

SEC. 3. It shall be unlawful for any person to kill any bird, except linnets, or to gather or destroy any eggs or nests in the City of Pomona.

SEC. 4. It shall be unlawful for any minor child under that age of sixteen years to smoke cigarettes in the City of Pomona.

SEC. 5. It shall be unlawful for any person to molest, interfere, or tamper with any of the fire plugs of the City of Pomona, or to give any false alarm of fire by shouting or otherwise, or by ringing the fire bell of said city.

SEC. 6. It shall be unlawful for any person to deface any building, tree, sidewalk, or curbing within the City of Pomona, by writing printing, pasting or posting thereon any name, word, sign, or advertisement of any description, or to hand out, distribute, throw any waste paper, posters, or advertisements of any kind on any of the sidewalks or streets of said city.

SEC. 7. It shall be unlawful for any person hauling any wood, hay or grain, in or into the City of Pomona, in any wagon or other vehicle, for barter or sale, to suffer or permit the same to
417 stand or remain for any time on Second Street, between Louisa Street and Parcels Street, while such wood, hay, or grain is being bartered, sold or offered for sale.

SEC. 8. It shall be unlawful for any person, firm or corporation owning or controlling any street-car, dray, wagon, buggy, carriage, or express wagon, to suffer or permit the same to stand on Second Street, between Louisa Street and Parcels Street. Provided that this section shall not apply to dray or express wagons while in actual use receiving or delivering goods.

SEC. 9. It shall be unlawful for any person to sleep on any of

the sidewalks, or in the public parks or other public places, in the City of Pomona, or in any dwelling, barn, outhouse, or other building in said city, without the permission of the owner, agent, or lessee thereof; or for any person to be or appear on any public street, alley or other public place in said city, in a state of intoxication.

SEC. 10. It shall be unlawful for any minor child under the age of eighteen years, to loiter around any railroad depot in the City of Pomona, without the consent of the owner, agent, or person in charge thereof, or to get on or off any railroad car, street car, engine, hand car, truck, or other vehicle, while the same is in motion, or at any time without permission of the owner, agent or person in charge of the same.

SEC. 11. It shall be unlawful for the owner or keeper of any room or place in the city of Pomona, in which billiards, pool,
418 ten pins, or other games are usually played, to play or permit any of such games to be played therein at any time between the hours of 11 o'clock p. m. on Saturday and 5:00 o'clock a. m. on the following Monday; or at any time or any other day of the week between the hours of 11 o'clock p. m. and 5:00 o'clock a. m. of the following day.

SEC. 12. It shall be unlawful for any person to run any horse race, bicycle or automobile race, either for a wager or for amusement, or to ride or drive any horse or other animal; or to ride, drive or propel any bicycle or automobile or any other vehicle in a fast or wreckless manner in the City of Pomona.

SEC. 13. It shall be unlawful for any person to place any obstruction of any kind in any public street or on any sidewalk in the City of Pomona, or to authorize, procure, or permit any obstruction to be placed therein or thereon. Each day any such obstruction is maintained or permitted in any such street or on any such sidewalk shall be deemed a separate offense. Provided, that merchants, for the display of goods, wares and merchandise may occupy a space three feet in width on the inside of sidewalk adjacent to the building; and that merchants and others receiving and delivering goods shall be allowed twelve hours from the time such goods are deposited on the sidewalk until they are removed, provided that a space five feet in width shall at all times be kept clear for accommodation of persons passing; and provided further, that this section shall not apply to the temporary obstruction of streets by buildings while the same are being moved from one place to another.

419 SEC. 14. Any of the acts and things in this ordinance prohibited when committed or permitted in the City of Pomona, shall be deemed and is hereby declared to be, a public nuisance.

SEC. 15. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on the conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the city jail of the City of Pomona, for a term not exceeding sixty days, or by both such fine and imprisonment, provided that any judgment that the defendant pay a fine shall also direct that in default of such payment he shall be

imprisoned in the city jail of the City of Pomona until such fine is satisfied in proportion of one day's imprisonment for every two dollars of the fine.

SEC. 16. Ordinance No. 109 and all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

SEC. 17. This ordinance shall take effect and be in force from and after its passage and publication according to law. Provided, that nothing herein contained shall apply to the trial of persons charged with offenses committed prior to the taking effect of this ordinance. In such cases the trial shall be had and the punishment shall be fixed in accordance with the ordinance heretofore existing.

SEC. 18. The City Clerk shall certify to the passage of this ordinance, and shall cause the same to be published once in
420 "The Pomona Review," and thereupon and thereafter it shall take effect and be in force.

Approved this 7th day of July, 1903.

W. H. POSTON,
President of the Board of Trustees of the City of Pomona.

Attest:

A. N. HARRIS,
City Clerk of the City of Pomona.
Per T. R. TROTTER, *Deputy.*

I hereby certify that the foregoing ordinance was introduced on the 7th day of July, 1903, and was passed by the Board of Trustees of the City of Pomona and signed by its President at a regular meeting of said Board, held on the 4th day of August, 1903, by the following vote:

Ayes—Trustees, Campbell, Douglass, Lobingier, Miller, Poston.
Noes—Trustees, none.
Absent—Trustees, none.

A. N. HARRIS,
City Clerk of the City of Pomona.
Per T. R. TROTTER,
Deputy.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of A. N. Harris. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3 Union Block, W. 2nd St., Pomona, Cal.

421 In the United States Circuit Court for the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation) et al., Respondents.

Affidavit of Charles L. Zahm.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

CHARLES L. ZAHM, being first duly sworn, deposes and says:

My name is Charles L. Zahm, and I was born in Tiffin, Ohio, October 2d, 1873, and have been in the telephone business since 1889, having started in this line of work with the Central Union Telephone Company (a Bell Corporation); after which I went with the independent telephone movement, in opposition to the Bell Company, constructing telephone exchanges. During this period I became identified with the construction of from thirty-five to forty telephone exchanges, in Ohio, Michigan, Kentucky, and Louisiana. With one or two exceptions, I installed all of the telephone equipment used by these plants, which ranged in size from 50 phone equipments to 6,000 phone equipments. On ten of these plants I acted as
422 engineer; also supervised all construction work, in pole line, underground, and installation of telephone and switchboard equipments, the largest of which was the exchange at Toledo, Ohio, of 6,000 telephones. I engineered all work at this plant except the installation of a switchboard. On all the balance of the twenty-five or more plants I was either directly in charge of all equipment installations or had charge of construction work or both. While connected with the company operating through Michigan, I was associated with the factory which manufactured all the equipment this company used. This connection brought me in contact with all the technical problems incident to the manufacture, use and operation of telephone equipment. Previous to this association, I learned telegraphy, and was quite proficient in handling a telegraph instrument, and was, and am still, acquainted with all technical and practical problems entering into ordinary telegraphy; also its combinations with telephony for use in construction, maintenance and operation. I came to the Pacific Coast in March, 1902, since which time I have engineered and constructed sixteen telephone exchanges, the largest of which are Los Angeles, Pasadena and Santa Barbara. I have also acted as engineer for two other plants in Southern California. I am at present engineering the construction of an independent telephone plant in Portland, Oregon, and am also retained as Consulting Engineer by several of the independent telephone

companies in Southern California. The exchanges I have built in the district are now operating over 27,000 telephones.

423 The telephone is an electro-magnetic device, by which articulate speech may be instantly transmitted or received from one point to another whether located in the same building, city or town, or in some distant city or state. It can be used for the transmission of music, or any sound where an exact and immediate reproduction is desired. Persons unskilled in the handling of a telephone can transmit intelligence by its use, thus making it at once a general public convenience and necessity for the rapid transaction of business between all points within telephonic reach, especially that which is exclusively local. The proportion of long distance telephone messages as compared with local telephone messages is extremely small, being approximately as one is to one hundred. An idea can be had as to the extent of its local use when one remembers that more than 350,000 conversations are held daily by the agency of the telephone in the City of Los Angeles alone. In the handling of all this vast amount of business the telegraph is not used. Messages transmitted by telephone do not require translation to become intelligible, neither does it require specially trained and skilled persons to send and receive a message. All the foregoing explanation relative to telephone use in Los Angeles is equally applicable in relation to the use of the telephone in the City of Pomona, but, of course, on a proportionally smaller scale. The vast use of the telephone to-day makes it necessary that two wires be used for each conversation. This is especially true of long distance telephone lines, or those used for the transmission of

424 articulate speech between distant points, such as Pomona to Los Angeles, Redlands, San Francisco, or Portland, Oregon. At the present time no commercially satisfactory scheme or device has been devised to use on a telephone line (which consists, as before stated, of two wires), for the carrying on of more than one conversation at a time by telephone over one line.

The telegraph is an electro-magnetic device for the transmission or receiving of intelligence by a succession of dots and dashes, arranged in code form, to represent different letters, phrases, or sentences in the alphabet. The code most commonly used in transmission of all public business by the commercial telegraph companies is that called the Morse code. The conception of the telegraph is entirely different from that of the telephone: First, because for all conditions of commercial use it requires but one wire for the transmission or receiving of intelligence. This one wire can be made to operate as four or more lines by the addition of the proper instruments. In other words, one wire can be made to do the work, by the addition of proper instruments and equipments, of four or more ordinary telegraph wires; secondly, because it is impossible to transmit articulate speech, or sound waves of any description by its use; thirdly, because it requires expert workmen to both transmit and receive intelligence; fourthly, because it is impossible for any one not familiar with the telegraph codes generally in use, and to one unfamiliar with the different alphabets comprising

the different codes, and one unfamiliar with the proper manipulation of the instruments, to transmit any intelligence whatever. As far as transmitting sound waves by the use of the telegraph instruments is concerned, you might talk to one until you were blue in the face without accomplishing anything towards transmitting intelligence; fifthly, it is not adapted to local use, nor is it locally used in the City of Pomona.

The Pacific States Telephone and Telegraph Company, otherwise known as the Sunset Telephone and Telegraph Company (or vice versa), in Pomona, are using devices for the duplexing of their telephone lines; in other words, have devices that, by attaching to the telephone lines, constructed for telephonic purposes, they can use same for telegraphic purposes. By the construction of a small, inexpensive equipment that can almost be carried in one's hat, it is possible to convert any long-distance telephone lines constructed for telephonic purposes in the City of Pomona into a full-fledged telegraph line by a few minutes' work at the central station of the Sunset and Pacific States Telephone and Telegraph Companies. This device, when properly built, will admit of the line being used simultaneously for telephoning and telegraphing without interference. The Sunset and Pacific States Companies are using a telephone line as one telegraph line, although it is possible to make two or more telegraph lines out of one telephone line, the devices for so doing differing from the first-mentioned case. With either one of the afore-mentioned combinations it is possible to carry on a conversation by telephone at the same time one or more messages are passing over the same set of wires by telegraph. The American Telephone and Telegraph Company (commonly known as the Long Distance Company throughout the Eastern States) are using this device for signalling between their different telephone offices. By so doing they are able to get much more use from the same. For instance, if the line should be in use telephonically they would be able to telegraph simultaneously over same between two offices and order a telephone connection to be made on that line after it had ceased to be used on the message then being transmitted telephonically, or to order up a connection on some other line; for instance, if Mr. Smith in Detroit, Michigan, would desire to talk to Mr. Brown in New York City, he would telephone that information by local phone to the long-distance operator at Detroit, and he would telegraph to New York City over one of the telephone lines ordering them to get Mr. Brown to the phone, after which they would be telephonically connected to each other, and the conversation carried on. The combination that the Pacific States Telephone and Telegraph Company and Sunset Company has in Pomona, savors very much of this condition, and I do not believe that, in the strict sense of the word, they can legitimately call themselves a telegraph company, because they are a telegraph company only in the sense of and for their own convenience. On driving over the Sunset company's plant in the City of Pomona on October 11th, 1905, I found that they have long distance telephone lines on two separate leads of poles. On one of the leads of poles men-

tioned three long distance lines entered the telephone ex-
427 change via West First Street and left the telephone exchange,
and ran out of the city, by way of the other lead of poles on Orange Grove Avenue. On this lead there appeared to be a line looped in to the Pomona Office; by "looped" I mean a line starting from any point, carried to and through any office, and on to some distant point. In this instance, it entered and left the city, via the exchange and the last-mentioned lead of poles, diverging at a point near the corporate limits. On both of these leads of poles local telephone lines are also carried; in fact said two leads of poles are supporting proportionately as many local telephone lines as other leads of telephone poles in the city. There were also four long-distance telephone lines running through the City of Pomona that were not connected to the Pomona telephone exchange for the use of the local subscribers of the Sunset and Pacific States Telephone and Telegraph Companies. The line construction of said companies in Pomona shows that they have no wires in said City exclusively used for telegraphing purposes.

I entered the office of the Sunset Telephone and Telegraph Company at Pomona, California, October 11th, 1905, and found but one telegraph instrument located in same. I was unable to see any switching device, or any me*ans* whereby this telegraph instrument could be switched from one long distance line to another, and it was, therefore, used solely on the one line, to which it, presumably, was connected. I passed the Pacific States Telephone and Telegraph Company's office on four different occasions, October 11th, 1905,
in Pomona, which office and place of business is together
428 with and the same as that of said Sunset Company, and
entered same, as before mentioned, making five different trips all told, by or in same, and in but one instance did I hear the telegraph instrument working, and then for a short period only. As far as appearances went, it would indicate that the telegraph instrument was used but little. The telephone switchboard had four operators working on same, and was apparently able to accommodate about four hundred independent local subscribers' lines. With the combination in use in this telephone exchange, it would appear impossible for any telephone subscriber to be connected to the telegraph line for telegraphic purposes; in other words, the system has been installed for telephonic purposes solely, and was not installed for the switching of any telephone line to that of said telegraph line, even of desired; in other words, by the methods of the Sunset or Pacific States Telephone and Telegraph Company at Pomona, it is impossible for any local telephone subscriber to telegraph a message from his station; but, to be able to send or receive a message by telegraph, it must either be telephoned to the telegraph operators at the office or to the subscribers' station, or have same delivered by messenger to the said office or station. In addition, the Western Union Telegraph Company and the Postal Telegraph Cable Company in Pomona, operating a telephone which is connected to the telephone exchanges of the Sunset or Pacific States Telephone and Telegraph Company in Pomona, or that of the Pomona Home

Telephone Company, would have the same telephonic privileges, as far as receiving and transmitting telegraphic messages
429 between Pomona and distant points by telegraph, as is now being enjoyed by the said Sunset and Pacific States Telephone and Telegraph Companies; and the subscribers of the afore-mentioned telephone exchanges would have the same conveniences and tariffs for the transmission of said telegraphic messages over the lines of said Western Union and Postal Telegraph Cable Company, at Pomona, as is now enjoyed by the subscribers of the Sunset or Pacific States Telephone and Telegraph Company in the transmission of telegraphic messages, if any, in connection with their afore-mentioned combined telephone and telegraph line. The fact that a person is a subscriber to the Sunset or Pacific States Telephone and Telegraph Company as a user for local service, does not entitle him to any special privileges or rights in connection with the long distance telephone lines, or the afore-mentioned telegraph line, being operated by the Sunset or Pacific States Telephone and Telegraph Company. The instruments installed in the local subscribers' place of business or residence are calculated only to transmit or receive articulate speech, as previously stated. As far as telegraphing or receiving a telegraph message on the part of any local telephone subscriber of any telephone company is concerned, it would be just as easy for the afore-mentioned party to write or read shorthand notes without first having learned the art of shorthand writing. And, furthermore, it would be necessary for him to keep in constant practice in order to maintain his efficiency.

430 In comparison between the Sunset or Pacific States Telephone and Telegraph Company on one hand and the Western Union Telegraph Company and the Postal Telegraph Cable Company on the other hand, I found, after investigation on October 11th, 1905, in said City of Pomona, that the Western Union Telegraph Company had two circuits and one instrument, and switchboard for the proper manipulation of the two telegraph lines in connection with the telegraph instrument, so that said instrument can be used on either of the two lines. The Postal Telegraph Cable Company on said day, in said City of Pomona, had one instrument and one line. These two companies handle the commercial telegraph business to and from Pomona. The total mileage of wire of the Western Union Telegraph Company in Pomona is eight and one-half miles approximately, and four and one-quarter miles of poles. The Postal Telegraph Cable Company has in Pomona four and one-quarter miles of poles and four and one-quarter miles of wire. The Pacific States Telephone and Telegraph Company or the Sunset Telephone and Telegraph Company have in Pomona approximately thirty-eight miles of wire and four miles of poles in use for long distance lines. This Company is using one telegraph instrument to handle its business, as against two telegraph instruments for the Western Union Telegraph Company and the Postal Telegraph Cable Company.

The Pacific States Telephone and Telegraph Company, and the "Sunset" or Sunset Telephone and Telegraph Company, or either, or

both, when herein referred to, has reference to the companies
431 and the same management jointly doing business in the City of Pomona, and elsewhere, and commonly known by those names, and I have no knowledge of the legal existence or legal rights and powers of either of said Companies, nor any knowledge of any regular telegraph business being actually conducted in said City by either of said Companies, nor any knowledge that the Sunset Company actually does any long distance telephone business to or from said City, and, therefore, I do not herein testify thereon.

CHARLES L. ZAHM.

Subscribed and sworn to before me this 19th day of October, 1905.

[SEAL.] LUCY E. WHEELER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavits of Charles L. Zahm. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 & 3 Union Block, W. 2nd St., Pomona, Cal.

432 [*Affidavit of George A. Ward.*]

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

George A. Ward, being first duly sworn, deposes and says:

That he is now, and for eleven years last past has been a resident of the City of Pomona, in the County of Los Angeles, State of California;

That he is now, and for four years last past has been the owner of the property situate on the southeast corner of Holt Avenue and Gordon Street, in said City;

That on or about February 4th, 1902, the Sunset Telephone & Telegraph Company, a corporation, placed and installed opposite his said premises a regular telephone pole of standard size and height; that said telephone pole was taken down as being an obstruction, a nuisance and a detriment to said property and unsightly;

433 That thereupon, said Sunset Telephone and Telegraph Company protested to the Board of Trustees of the City of Pomona, and asked the aid of said Board of Trustees in the matter of the installation and placing of said telephone pole;

That said Board of Trustees gave no relief to said Sunset Telephone & Telegraph Company, and said telephone pole was never permanently replaced and no telephone pole has since been or is now on or opposite or abutting said property.

GEORGE A. WARD.

Subscribed and sworn to before me this 13th day of November, 1905.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. In the Circuit Court of the United States, Ninth Circuit, for the Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of George A. Ward. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. City At-orney, Rooms 2 & 3 Union Block, West 2nd St., Pomona, Cal.

434 [*Affidavit of Moses Petty.*]

In the United States Circuit Court of the Ninth Judicial District, Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

UNITED STATES OF AMERICA,
County of Los Angeles, State of California, ss:

Moses Petty, being first duly sworn, deposes and says: I am now and have been for eighteen years last past, a resident of the City of Pomona, in the County of Los Angeles, State of California; that from October, 1889, to March, 1897, I was Superintendent of Streets of said City of Pomona; that from April, 1901, to April, 1903, I was duly elected, qualified and acting member of the Board of Trustees of said City of Pomona; that during the said time that I was such member of said Board of Trustees, I was the duly appointed and acting chairman of the Street Committee of said Board of Trustees, and at many times, and continually during my said term, as a member of said Board, *and continually during my said term,*
435 *as a member of said Board,* and as a member of said Street Committee, did the question of said Sunset Telephone and

Telegraph Company, obtaining a franchise from said City of Pomona arise; that Ordinance No. 30 of said City, granting a franchise to said Sunset Telephone and Telegraph Company, had then by its own terms expired; and that, as it had no franchise, or right to do business in said City of Pomona, I, as said chairman of said Street Committee, immediately instructed S. C. Slanker, Superintendent of Streets of said City, to forbid and prohibit the future construction of its said system in the City of Pomona, and, upon the violation of said order and the ordinances of said City, that any person or persons, whomsoever, digging or setting or fixing or attaching any new poles, wires or apparatus of said complainant Company, that he or they be immediately arrested and prosecuted under the City Ordinances and the laws of the State of California; that in pursuance of said order and the will of said Board of Trustees, all new construction of said complainant Company was completely stopped, and the digging and setting of all new poles and attaching of new wires was forbidden and prohibited to the end of my said term as said member of said Board of Trustees.

During my said term many discussions arose in regard to this matter, and in the endeavor of said Board of Trustees to compel said complainant Company to secure a franchise from said City, many agents and representatives, at various times, appeared before
436 said Board of Trustees in behalf of said complainant Company. I have continually asked said complainant Company why it did not take out a franchise, and it has as often replied, including the answer made by one G. W. Gates, then the Manager of said complainant Company at Pomona, California, that it was because the complainant Company would have to pay two per cent on its gross annual receipts, and, also, because said complainant Company would have to secure and obtain immediately a franchise in other cities throughout the State of California; that during the latter part of my said term, as said member of said Board of Trustees, William E. Dunn, of Los Angeles, and Howard A. Broughton, of Pomona, California, two attorneys for said complainant Company, and Frank Smith, its Manager at Pomona, California, either together or separately, continually and continuously requested said Board of Trustees to permit the installation of new poles, but said Board of Trustees absolutely refused to grant said request, and at all of said times said Board of Trustees signified its willingness to grant any proper franchise to said complainant Company, in pursuance of the City ordinances and as provided by the laws of the State of California; that the resolution and permission granted to the Pacific States Telephone and Telegraph Company, August 20th, 1902, was to enable said Pacific States Telephone and Telegraph Company to remove and change the location of certain poles and wires on and along First Street in the City of Pomona, made
437 necessary by the construction of the railroad bed of the San Pedro, Los Angeles and Salt Lake Railroad Company, as said railroad was constructing and had the right to construct, under and by virtue of its franchise from said City, as represented by Ordinance No. 215, duly passed and adopted April 15th, 1901; that said poles and wires so removed were removed under and pursuant

to said resolution of August 20th 1902, as the same appears in Record Book No. 3 of said Board of Trustees, at page 197.

That the resolution of date of February 20th, 1903, appearing in Record Book No. 3, of said Board of Trustees, at page 282, instructing the City Attorney to draft an ordinance, to remove the wires from Second Street, was passed only and solely for the purpose of clearing an obstruction and a public nuisance upon that portion of Second Street, which is the business center of the City of Pomona; and that in considerattion of the passage of said resolution and order, there was no understanding or agreement in any manner whatsoever, by which the members of the Board of Trustees, or the Board of Trustees, agreed that upon such removal from said portion of Second Street that said City, or its Board of Trustees would not require the franchise which said City and its officials had constantly insisted upon said complainant Company securing.

That I, the said Petty, have read said Ordinance No. 30, and know the contents thereof, and while serving my said term as Street Superintendent of said City, have worked thereunder.

438 That in pursuance of said ordinance and the order of the Board of Trustees, and upon the request and solicitation of said complainant Company, when I was such Street Superintendent that I have continuously and at many times assisted said complainant Company in the installation of its poles under said Ordinance No. 30, by pointing out and designating the curb lines distances of said streets, so that the poles of said complainant Company could be placed within and adjoining the said curb lines.

That at all times that I acted as said Street Superintendent that said complainant Company installed and constructed its said telephone system in said City under the provisions of Ordinance No. 30, and under no other ordinance or right whatsoever, and that its officers and agents continually worked thereunder, and admitted and acknowledged that its right to so operate and construct in Pomona was under the provisions of Ordinance No. 30.

That during the said time that I acted as member of the Board of Trustees of said City, said complainant Company never offered, in any manner, shape or form to pay said City a compensation or considerattion for the rental and use of the said streets of the City of Pomona.

That I am familiar with the commercial business done by said complainant company in the City of Pomona, if any at all; that it is in a commercial sense and in a business sense, a local telephone company, and not a telegraph company; that telephone boxes and instruments are install- in the various residences and places of

439 business — the complainant subscribers in said City, and that telegraphic instruments are not so installed for commercial purposes in said residences and places of business, either for local or long distance purposes: that the communications had thereunder and therefrom are those of telephone communications, or that which is transmitted and received by means of articulate speech, and not by any telegraphic instrument whatsoever.

MOSES PETTY.

Subscribed and sworn to before me, this 16th day of November, A. D. 1905.

[SEAL.]

J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of Moses Petty. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 and 3 Union Block, W. 2d St., Pomona, Cal.

440 [*Affidavit of S. C. Slanker.*]

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

S. C. Slanker, being first duly sworn, deposes and says: That I am now, and for eighteen years last past have been, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That continuously since May, 1901, I have been the duly appointed, qualified and acting Superintendent of Streets of said City of Pomona;

That I remember the incident in regard to the cutting of the telephone pole or guy post on Holt Avenue, along the curb line opposite the property of Mr. and Mrs. George A. Ward, on or about the 3d day of February, 1902;

That said telephone pole or guy post was cut on or about said day, and that an agent and employee of said complainant Company, came to me and asked my assistance, as said Superin-
441 tendent of Streets, to assist said complainant Company in the installation of its said telephone pole or guy post opposite the said Ward premises; I thereupon immediately informed them that their franchise from the City of Pomona, as represented by Ordinance No. 30, had expired, and that they had no franchise or other rights to construct said telephonic system within the corporate limits of the City of Pomona; and that I, as such Street Superintendent, would give them no assistance or help whatsoever in the matter;

that thereupon said complainant Company also requested my assistance, as such Superintendent of Streets, for the installation of said telephone pole or guy post on the Fleming corner, which premises are just west of and opposite and across Gordon Street from the Ward premises; and I again refused any assistance for the installation of any poles or posts on the said Fleming premises upon the same grounds, that said complainant Company had no franchise or rights in said City, and that no assistance would be rendered until they had secured the proper franchise and rights from the proper authorities;

That I also remember when the poles and lines running along First Street in said City, from the westerly to the easterly City limits, were changed for the purpose of permitting the Salt Lake Railroad to construct its railroad track; and that said change of location of said poles and wires was made under and in pursance of the permission given by the Board of Trustees of said City, August
442 20th, 1902, to the Pacific States Telephone and Telegraph Company, and while I was such Superintendent of Streets of said City of Pomona;

That during the years May 1901, to April, 1903, when Moses Petty and Frank D. Green were members of the Board of Trustees of said City, that said Board of Trustees instructed me, as such Superintendent of Streets, not to grant any privileges, rights or permits to use any of the streets of said City, unless said complainant Company should apply for and secure the proper franchise;

That during said term said complainant Company was forbidden and prohibited from constructing new poles and wires within said City, or making telephonic connections or installing telephonic instruments in the houses or offices of new subscribers;

That during all of the times I have been such Superintendent of Streets, I have never—to the best of my knowledge—given any permission or franchise or rights to said complainant Company for the new construction or installation of its poles, wires or apparatus within the City of Pomona; nor have I given any written or oral consent; nor have I acquiesced in, or permitted any such new construction;

That under and pursuant to an order and resolution passed by the Board of Trustees of said City, February 4th, 1904, I as said Superintendent of Streets, served a notice upon said complainant Company, on the 6th day of February, 1904, which said notice was, by Frank Smith, Manager of said complainant Company, ad-
443 mitted in writing, and accepted by him as service upon said Company;

That said notice so served by me, was issued and served upon said complainant Company solely as a matter of police regulation, and because the necessity of the case demanded the removal of the poles and wires on that portion of Second Street, in said City of Pomona, because the same is, and was the business center of said City;

That there was no agreement or understanding or arrangement, expressed or implied, of whatever kind or nature, between the said complainant Company and myself, by which I agreed with said complainant Company, or with any one else, that if it should remove its

said poles, wires and apparatus from said portion of Second Street, that I would permit, or acknowledge—in any manner, shape or form—its right to carry on construction within the City of Pomona, without obtaining a new franchise, as hereinbefore pointed out;

That on the 4th day of September, 1905, I served upon Frank Smith, for the Pacific States Telephone and Telegraph Company, at Pomona, California, the written notice—contained in the City Clerk's certificate of papers on file in the office of the City Clerk of said City—by leaving a copy of said notice with said Frank Smith for said Pacific States Telephone and Telegraph Company;

That said Pacific States Telephone and Telegraph Company has never complied with my request, nor at all, to give me such information as contained and requested in said notice of September
444 4th, 1905;

That the notice served on me by said complainant Company, and referred to in its said bill of complaint, was attested by F. W. Eaton, Secretary;

That the purported telegram hereto annexed, and its envelope, were received by me, August 29th, 1905, the same being delivered to me in the office known as the office of the Sunset Telephone and Telegraph Company and the Pacific States Telephone and Telegraph Company:

That I do not know whether the same is a telegram or a telephone or any message whatsoever, or that the same was sent from Reno, Nevada, or from any other place; neither do I know the purported sender of said message, Chas. Wilson; and, to the best of my knowledge, I have never known him; neither do I know that there is such a man living, nor that such a man has ever lived;

That I say the same in regard to John Wilson, the one in said purported message referred to; and, as far as I know, he has never contracted or done any work in the city of Pomona, or elsewhere; nor have I ever had any dealings, business relations or otherwise, with him;

That said message was delivered prepaid, and without any cost or expense to me, whatever;

That I gave continual verbal notices, besides those written notices, contained in complainant's bill of complaint, to Frank Smith, Manager of said complainant company, at Pomona, California, notifying him to either secure the franchise requested of his Company,
445 or to begin the work of removing all said complainant's poles, wires and apparatus from the streets of said City;

That the last verbal notice was given him at 1:00 o'clock P. M., Friday, September 1st, 1905, just before I commenced the removal of a portion of its line on Ellen Street;

That during all of the times I was engaged in the removal of said line, the representatives and agents of said complainant Company were continually on the watch and knew the whereabouts and continually kept posted and informed as to my movements and where I was and how far I had progressed in carrying out the orders of said Board of Trustees for the removal of said poles and wires;

That during most of the time I was so engaged in said work of

removal, Mr. Frank Smith, said Manager of said complainant Company, and another gentleman—apparently the attorney of said complainant Company—together in a carriage, continually and at frequent intervals, walked their horse back and forth on the street of and in full view of the work, and made no protest or objection whatsoever;

That I hereby estimate the cost incurred by said City up to the time of the service of the injunction in this case, in the removal of the said poles and wires to be Twenty-eight ($28.00) Dollars.

[SEAL.] S. C. SLANKER.

Subscribed and sworn to before me, this 17 day of November, 1905.

U. E. WHITE,
Notary Public in and for the County of Los Angeles, State of California.

446 [*Telegram.*]

14 Paid 77 B-R 11:15 A.

Pacific States Telephone and Telegraph Co.
Long Distance.
Pacific States Telephone and Telegraph Co.

Received by Telegraph from Reno, Nevada. Aug. 29-05.

C. C. Slanker, Supt. of Streets, Pomona:

Is John Wilson working for you or doing any contracting for you? Answer Prepaid.

CHAS. WILSON.

Envelope addressed as follows:
Pacific States Telephone and Telegraph Co.
Long Distance.
Pacific States Telephone and Telegraph Co.

Mr. Slanker, Street Supt.,
Pomona.

No. —.
Charges Paid.

[Endorsed:] No. 1209. In the Circuit Court of the United States, Ninth Circuit, for the Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation,
447 complainant, vs. City of Pomona et al., respondents. Affidavit of S. C. Slanker. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 and 3 Union Block, W. 2d St., Pomona, Cal.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Second Affidavit of S. C. Slanker, Street Superintendent.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

S. C. Slanker, being first duly sworn, deposes and says:

That I have made a former affidavit herein and file this as my second affidavit and statement of facts in this case.

That under and pursuant to the resolutions and orders of the Board of Trustees of the City of Pomona, I began work in pursuance thereof by going out to the extreme end of the Ellen Street telephone line, and then began to work in toward the local tele-
448 phone exchange of said complainant Company and Pacific States T. & T. Co. by taking down the poles and wires as I progressed;

That only local telephonic poles and wires and apparatus were taken down by me while I so worked; and that I was most careful to avoid and I did avoid the taking down or interfering with any long distance telephone wires of any Company; and particularly did I avoid, and I did not take down any telegraphic wires, if any, claimed or owned by said complainant Company, or any other Company;

That all my said work was confined strictly to said resolutions and orders of said Board of Trustees made and entered for the purpose, as aforesaid, of removing only the local or short distance telephone poles, wires and apparatus of said complainant Company, situate, lying and being solely within the limits of the City of Pomona and connecting with the local telephone exchange in said City, and running from said local telephone exchange out through various and many Avenues and Streets of said City, and terminating with said City, without making any direct telephonic connection with any other subscriber in the State of California, or elsewhere, except other local telephone subscribers in said City connecting with the telephone exchange in said City and on said terminating lines and wires in said City.

S. C. SLANKER.

449 Subscribed and sworn to before me, this 21 day of November, 1905.

[SEAL.] J. A. GALLUP,
Notary Public, in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainants, vs. City of Pomona et al., Respondents. Second affidavit of Street Superintendent. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 and 3 Union Block, W. 2d St., Pomona, Cal.

[*Affidavit of Frank D. Green.*]

In the United States Circuit Court of the Ninth Judicial Circuit Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Frank D. Green, being first duly sworn, deposes and says:

450 That I am now, and for more than fourteen years last past, have been a resident of the City of Pomona, in the County of Los Angeles, State of California;

That from the 5th of November, 1902, until the 20th day of April, 1903, I was a duly appointed, qualified and acting member of the Board of Trustees of the City of Pomona;

That I was a member of the Board of Trustees at the same time as Moses Petty, and that our terms expired at the same time;

That I am familiar with the endeavor of the Board of Trustees to compel Sunset Telephone and Telegraph Company to secure a franchise from the City of Pomona, as well as pay a consideration for the use of the streets;

That prior to my appointment upon said Board, said Sunset Telephone and Telegraph Company had been ordered to desist and discontinue any new construction of its telephone poles and wires within the City of Pomona, and that the Street Superintendent of said City had been instructed and was prepared to, and would have arrested any of the employees, agents or managers of Sunset Telephone and Telegraph Company, or Pacific States Telephone and Telegraph Company, had it, or they, or either of them made any attempt to lay or construct any new poles or wires or apparatus, and that all new construction of said Company, and both of them, were completely stopped, and the digging and setting of all new
451 poles and attaching of new wires, was forbidden and prohibited to the end of my said term, as said member of said Board of Trustees;

That on two or more occasions during my said term did the offi-

cers and attorneys and representatives of the Sunset Telephone and Telegraph Company, or the Pacific States Telephone and Telegraph Company, particularly appearing by Howard A. Broughton, its Attorney at Pomona, California, and by Frank Smith, its Manager, at Pomona, California, before said Board of Trustees, asking for permission to extend their telephone lines and services to new subscribers; and on one occasion did said agents, attorneys and representatives of said Sunset Telephone and Telegraph Company, and Pacific States Telephone and Telegraph Company say, that the same legal point of necessity for securing a franchise had also arisen in the City of Redlands, California, and asked said Board of Trustees' permission to extend its plant at Pomona, in consideration of said complainant Company abiding by the decision to be rendered in the Redlands case, in the United States Circuit Court;

That said agents, attorneys and representatives of said complainant Company stated that said complainant was in good faith and were earnestly and honestly endeavoring to secure a decision in the said Redlands case which would settle the point at issue in Pomona;

That said Board of Trustees did not rescind any action whatsoever, and said complainant Company was again refused and denied any rights whatsoevr to install or construct any new tele-
452 phonic service within the corporate limits of the City of Pomona, unless it would secure a franchise from the City of Pomona similar to that formerly granted to the Pomona Valley Telephone and Telegraph Union;

That I am familiar with the general nature of the commercial business done by the Sunset Telephone and Telegraph Company or the Pacific States Telephone and Telegraph Company, in the City of Pomona;

That its business is that of a telephonic nature, or by the transmission of messages by means of articulate speech; and that in the residences and offices of subscribers of the said Companies are installed telephonic instruments and appliances for the transmission of said articulate speech; and therein are not found, for any commercial purposes whatsoever, any telegraphic instruments for the transmission of either long or short distance telegraphic messages;

That the Resolution, of date February 25th, 1903, appearing in Record Book No. 3 of said Board of Trustees, at page 282, instructing the City Attorney to draft an Ordinance to remove poles and wires from Second Street, was passed only and solely for the purpose of clearing an obstruction and a public nuisance on that portion of Second Street, which is the business center of the City of Pomona; and that in consideration of the passage of said resolution and order there was no understanding or agreement in any manner whatsoever by which the members of the Board of Trustees, or the Board of Trustees, agreed that, upon such removal from such
453 portion of Second Street, that said City or its Board of Trustees would not require the franchise which said City and its officials had constantly insisted upon said complainant Company securing.

FRANK D. GREEN.

Subscribed and sworn to before me this 17th day of November, 1905.

[SEAL.] U. E. WHITE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of Frank D. Green. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 and 3, Union Block, W. 2d St., Pomona, Cal.

[*Affidavit of Geo. W. Ogle.*]

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

454 UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Geo. W. Ogle, being first duly sworn, deposes and says:

I am now, and for fourteen years last past have been a resident of the City of Pomona, in the County of Los Angeles, State of California;

That I am now, and since April, 1901, have been the duly elected, qualified and acting City Marshal of said City of Pomona;

That the annexed communication, with its envelope, which purports to be a telegram from Tacoma, Washington, was delivered to me August 31st, 1905, by messenger.

That I do not know the said John S. Baker, nor have I ever had any business or other dealings with him, nor do I know that such a man lives; neither do I know that this is a long distance telephone or telegraph message, sent from Tacoma, Washington, or any other place; and that as far as I know, no such man so described in said purported telegram as Wagner is now living or has ever during my residence in said city, lived in the city of Pomona; nor have I ever known him;

That on September 18th, 1905, I personally examined the Register of Action and papers in Case Sunset Telephone & Telegraph Company vs. City of Redlands, et als., No. 1067, as the same appear on file in the office of the Clerk of the United States Cir-
455 cuit Court, in the City of Los Angeles, State of California: that the bill in equity filed therein, was filed with said clerk

March 23d, 1903, and that said bill was dismissed by decree and order of the Honorable Olin Wellborn, June 1st, 1903, upon request and praecipe, filed therefor by E. S. Pillsbury, May 13, 1903; that no answer was filed in said case by or on behalf of the City of Redlands or any of said defendants; that no affidavit or affidavits whatever were filed in said case by any of said defendants;

That I am familiar with and know the nature of the commercial business done by said complainant Company, in the City of Pomona; that it does a commercial local telephone business, and not a telegraph business;

That I am familiar with the apparatus contained in the residences and offices of the subscribers of said complainant Company in said City of Pomona, and that said apparatus is that designed for and used solely for the purpose of telephonic communication by means of articulate speech and is incapable and impossible of telegraphic use, as so constructed;

That from a business and commercial standpoint, the telegraph business in said City is done by the Western Union Telegraph Company and Postal Telegraph and Cable Company.

GEO. W. OGLE.

Subscribed and sworn to before me this 17th day of November, 1905.

[SEAL.]

U. E. WHITE.
Notary Public in and for the County of Los Angeles, State of California.

456 [*Telegram.*]

B—R 11 P'd 64.

Pacific States Telephone and Telegraph Co.
Long Distance.
Pacific States Telephone and Telegraph Co.

TACOMA W-8-31-05.

Received By Telegraph from Geo. W. Ogle, City Marshal, Pomona—

I have located Wagner so not necessary to continue search there—

JOHN S. BAKER.

4:20 p. m.

An envelope addressed as follows:
Pacific States Telephone and Telegraph Co.
Long Distance.
Pacific States Telephone and Telegraph Company.
Geo. W. Ogle, Pomona.
No. —.
Charges P'd.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Tele-

phone and Telegraph Co., a Corporation, Complainant, vs.
457 City of Pomona et al., Respondents. Affidavit of Geo. W. Ogle. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks. Solicitor for Respondents, Rooms 2 and 3, Union Block, W. 2d St., Pomona, Cal.

[*Affidavit of Robert G. Loucks.*]

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

UNITED STATES OF AMERICA,
State of California,
County of Los Angeles, ss:

Robert G. Loucks, being first duly sworn, deposes and says: That I am now, and for more than twenty years last past have been, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That I am now, and continuously since the 15th day of April, 1901, have been the duly elected, qualified and acting City Attorney of said City of Pomona;

That I distinctly remember the incident in regard to the
458 telephone pole or guy post controversy, on or about the 4th day of February, 1902, at which time said complainant Company attempted to install said telephone pole or guy post opposite the said Ward property, referred to in other affidavits in this case; that one G. W. Gates was then the Manager of said complainant Company and Pacific States T. & T. Co., at Pomona, California, and came to my office in behalf of said complainant Company seeking the assistance of said City of Pomona in the matter of installing said telephone pole or guy post; that I, as said City Attorney, informed said Gates that his Company had no franchise in the City of Pomona, and that said franchise had expired; that after considerable discussion, I informed him that I would do nothing whatever to assist him or his Company in the matter; that the request on file, signed by the said G. W. Gates, for said complainant Company, was so filed by the said Gates, and at an early meeting thereafter of the Board of Trustees of said City of Pomona, said Gates appeared before said Board of Trustees and made the same request of said Board; that I, as said City Attorney, then and there gave as my legal opinion that said complainant Company was without any franchise rights whatever within said City, and that it should secure a new franchise;

That I, soon after my induction in office, in 1901, advised the Board of Trustees of said City of the expiration of Ordinance No. 30 of said City, and that since the time of rendition of said opinion, and said Ward incident of February 4th, 1902, the matter
459 of enforcement of said complainant Company to secure a proper franchise or a renewal of its franchise from said City has never been dropped, but that the controversy has continually and constantly waged;

That all of said times that I have been City attorney, I have kept well informed as to this case and with all its incidents and issues;

That from an examination of the records and minutes of the City of Pomona, and from my own personal observation, I am satisfied that the Board of Trustees of said City of Pomona has never granted, nor intended to grant, any rights, privileges or franchises to said complainant Company, or to the Pacific States Telephone and Telegraph Company, except the franchise granted to said complainant Company in the year 1888, as evidenced herein by ordinance No. 30 of said City;

That the Pacific States Telephone and Telegraph Company has no franchise, right or privilege from said City, or any Board of Trustees of said City, to do and carry on a telephone or telegraph business, or any other business whatsoever in said City;

That William E. Dunn, of Los Angeles, one of the Attorneys of said complainant Company, has several times appeared before the Board of Trustees of said City, in behalf of said complainant Company; that he has also called at my office and consulted with me in reference to the matter; that at the beginning of our endeavor to place Sunset on an equal basis with other citizens and corporations, said William E. Dunn relied principally upon section 536,
460 Civil Code of the State of California, as the source of authority for his said Company, and that said section 536 gave his said Company rights and privileges to operate within said City of Pomona, independent of, separate from, and without regard to the rights or wishes of said City of Pomona, or its Board of Trustees;

That there was at the time of the filing of the bill of complaint herein, and continuously up to November 14th, 1905, a map of the Pacific States Telephone and Telegraph Company hanging up in the office of "The Daily Progress," a daily newspaper published in said City of Pomona, from the identical print of the same size, and the same commercial map referred to in the affidavits of Judge John H. Lee and S. N. Curry, heretofore and duly sworn to in this case; that one of the same maps was given to my father, R. N. Loucks, by a representative of the Sunset Telephone and Telegraph Company, or the Pacific States Telephone and Telegraph Company, on or about the year 1902, and the same remained in his office till the time of the commencement of this suit, at which time I took possession of it, and will later leave said map with said complainant Company as a copy of the originals to be filed by us in this case; this makes four maps from the same print, size, color and purpose, from said Pacific States Telephone and Telegraph Company, that I have seen in four different offices in said City of Pomona, two of which

it is our intention to file with the Clerk of the United States
461 Circuit Court, and one to be delivered and left with said complainant Company, as aforesaid:

That the "exchange subscription" contract, the original of which is attached to this affidavit, was left with me for my signature, on or about the 1st day of October, 1902;

That said "exchange subscription" and said contract form for local telephonic service is still used by said complainant Company, and was so used by said complainant Company on the 6th day of September, 1905, at which time I secured from said complainant Company copies of said original "exchange subscription" contract, for the purpose of serving said copies upon said complainant Company in this case:

That the receipted telephone bills attached to this affidavit are the original telephone bills paid by me at the times represented and stated in the many respective bills hereto annexed; and that said telephone bills represent the true amounts paid by me for said telephonic service, and state also the places with which I had telephonic communication, from the year 1901, up to and including the time of the filing of the bill of complaint in this case;

That the respective amounts stated in said bills were charged by and paid to the Sunset Telephone and Telegraph Company for 'phone rental and local telephonic service; while all long distance telephonic messages were charged by and paid to Pacific States Telephone and Telegraph Company;

That the purported telegram attached hereto, addressed
462 to F. G. Loucks, was delivered to me by Frank Smith, Manager of said complainant Company and said Pacific States Telephone and Telegraph Company, at Pomona, California, on August 22d, 1905;

That the paper upon which said purported telegram is written, and also the envelope enclosing said purported telegram, are marked with and contain the trademark and sign of said Pacific States Telephone and Telegraph Company;

That I did not pay for said message or for the delivery thereof;

That I do not know the sender of said purported telegraph message, nor as far as I know have I ever had any business dealings with him, nor have I ever known him, nor do I know in fact that any such man as Richard N. Montague now lives or has ever lived, nor do I know whether this is a telegram or a telephone or any message whatsoever, as it was delivered to me at the time said complainant Company was preparing its case;

That the annexed blank form containing the trademark sign of the Pacific States Telephone and Telegraph Company, and the name of said Company written out in bold, heavy black letters across the top thereof, was obtained by me from the joint office of said Sunset Telephone and Telegraph Company and said Pacific States Telephone and Telegraph Company, subsequent to the filing of complainant's bill of complaint herein;

That the annexed two copies of long distance telephone
463 notices served upon me October 26th and October 28th, respectively, to respond to a long distance message in the City

of Orange and in the City of Los Angeles, both being in the State of California, were delivered at my office on the said dates, and I answered and made response thereto by calling at the joint office of said Sunset Telephone and Telegraph Company and Pacific States Telephone and Telegraph Company; that said notices contain the trademark sign and the name of said Pacific States Telephone and Telegraph Company;

That the original letter attached to this affidavit, of date February 10th, 1905, from J. H. G. Weaver, of Eureka, California, was sent me in response to my inquiry and communication to him in regard to the filing of an opinion in the Eureka case by Judge Beatty;

That the annexed carbon copy of my letter of March 22d, 1905, to said complainant Company, was by me mailed and sent to said Company on said date in compliance with the suggestion made to me by Frank Smith, the Manager of said Sunset Telephone and Telegraph Company and the Pacific States Telephone and Telegraph Company, at Pomona, California, which said Frank Smith, at said time told me that said complainant Company would willingly and would gladly answer any of my questions and give me such information as I desired concerning said complainant Company, and its relation with said Pacific States Telephone and Telegraph Company;

That said Frank Smith and said complainant Company,
464 and its representatives and attorneys have at all times they have been called upon to render this information absolutely refused and failed to comply with this request, and have not given us any such information;

That the letter from E. S. Pillsbury, General Counsel, San Francisco, California, dated June 2d, 1905, to me, and annexed to this affidavit, is the original letter so received from E. S. Pillsbury, one of the Attorneys of said complainant Company, and is not in response to my letter seeking information, but is another play for time, such as said complainant Company gave us during the pendency of the Redlands telephone case;

That the annexed letter from San Francisco of date July 28th, 1905, from Southard Hoffman, Clerk United States Circuit Court, was duly received by me in response to my letter for information in regard to the writing of any opinion by Judge Beatty, in the Eureka Telephone case, and answers the question why said opinion, if any, was not regularly filed and printed in the official reports;

That I am familiar with and know the nature of the apparatus and appliances, transmitters and receivers used in the said City of Pomona by said complainant Company and Pacific States Telephone and Telegraph Company, either for long or short distance messages, and connecting houses and offices of its subscribers in said City, and that the same are used by its said subscribers simply and purely
for telephonic purposes, and only for the transmission of
465 articulate speech between any of said subscribers, or in conversation or communication of any of said subscribers with the office of said complainant Company, or any Company;

That for regular commercial and business use there are no telegraph instruments whatsoever in the offices or residences of any of the subscribers of said complainant Company or said Pacific States Telephone and Telegraph Company in the said City of Pomona, or in the City of Los Angeles, or in the City of San Francisco; or, as far as I know, in any other city in the United States;

That during all the times that S. S. Slanker, the Street Superintendent of the City of Pomona, continued the taking down of the telephone poles and wires in said City of Pomona, I was his legal adviser;

That in compliance with the resolutions and orders of the Board of Trustees of the City of Pomona, declaring the local poles and wires of said complainant company herein a public nuisance and obstruction upon the streets of said city, I advised said Street Superintendent to remove only the poles and wires of said complainant company doing a strictly local telephone business in said city;

That to the best of my knowledge the only poles and wires removed by said Street Superintendent were those used for purely local telephonic purposes;

That said Street Superintendent, at the beginning of said removal, followed out the Ellen Street telephone line to its ending and worked in toward the center of the city, and followed
466 it in toward the local telephone exchange office, so as not by any chance to cut any long distance telephone wires or any telegraph wires, if any; that when said Street Superintendent was so engaged, he did not cut any telegraph wires whatsoever in said City of Pomona;

That, as is stated in the affidavit of said Street Superintendent, Mr. Frank Smith, said Manager at Pomona, California, and his companion, apparently an attorney for said complainant company, kept in continual touch, and knew of the whereabouts and moves that were being made by said Street Superintendent;

That said agents of said complainant company many times in carriage walked their horse in close and full view of the work and made no objection whatsoever; and permitted said Street Superintendent to continue his work of taking down said local telephone poles and wires from September 1st to September 5th, 1905, without making any objection or protest or taking any legal steps whatsoever, after having had more than thirty days' notice of the intention of the Board of Trustees of said city to take down and remove said local telephone poles and wires upon failure of said complainant company to obtain the proper franchise from said Board of Trustees.

ROBERT G. LOUCKS.

Subscribed and sworn to before me, this 21st day of November, 1905.

[SEAL.]

J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

467 [*Letter—J. H. G. Weaver to R. G. Loucks.*]

J. H. G. Weaver, Attorney at Law,

T

Eureka, California.

FEB. 10/1905.

In re: Mr. R. G. Loucks, Atty.-at-Law, Pomona, Cal.

DEAR SIR: I beg to acknowledge the receipt of your letter: Our telephone case was settled by—compromised—a new incoming Council. No opinions were ever rendered in it. It was in the U. S. Circuit Court.
Court.

Yours truly,

J. H. G. WEAVER.

[*Letter—Robert G. Loucks to Sunset Telephone and Telegraph Company.*]

POMONA, CALIFORNIA, *March 22nd,* 1905.

Sunset Telephone and Telegraph Company, Pomona, California.

GENTLEMEN: Will you kindly answer the following questions:

Is the Sunset Company a California corporation, being originally incorporated under the laws of the State of California? If so, where is its principal place of business?

In what other states does the Sunset do business as the Sun-
468 set Telephone and Telegraph Company? Has it original or certified copies of its articles of incorporation filed in California and the other states in which it operates? If so, which and where?

If the Sunset is a foreign corporation, who is the designated person residing in this state upon whom process issued by authority by or under any law of this state, may be served? And his address?

Please answer the above questions, also in writing, as to the Pacific States Telephone and Telegraph Company.

Also what is the business and legal relationship existing between the Sunset and the Pacific States Company?

Very truly yours,

ROBERT G. LOUCKS,
City Attorney for the City of Pomona.

L-G.

[Endorsed on back:] Letter for Information to Sunset T. & T. Co.

469 [*Letter—E. S. Pillsbury to R. G. Loucks.*]

Subject.

Law Office of Pillsbury, Madison & Sutro.
Rooms 1004-1015, Union Trust Building.

E. S. Pillsbury.
Frank D. Madison.
Alfred Sutro.
Horace D. Pillsbury.
Oscar Sutro.
Cable Address "Evans" W. U. T. Code.

SAN FRANCISCO, *June* 2, 1905.

R. G. Loucks, Esq., City Attorney, Pomona, Cal.

DEAR SIR: Mr. John Lawrence, Division Manager of the Telephone Company at Los Angeles, has written me that a question has arisen about the position of the Company in Pomona, and suggested that I should have a conference with you on the subject; I expect to go to Orange County during this month to try a case there and will be pleased to confer with you before returning, if that arrangement will be satisfactory. Mr. Lawrence has indicated in a general way what contentions are put forward on behalf of the City of Pomona, and I shall be pleased to discuss them with you.

With the assurance in advance that the Telephone Company desires to comply with all lawful regulations made by municipalities in which it does business, and to meet all officials in a spirit of fairness, I remain

470

Yours very truly,

E. S. PILLSBURY,
General Counsel.

[*Letter—Clerk Circuit Court to Robert G. Loucks.*]

Office of Clerk United States Circuit Court, Northern District of California.

No. 13248.

SUNSET TELEPHONE AND TELEGRAPH CO.
vs.
CITY OF EUREKA, etc., et al.

SAN FRANCISCO, *July* 28, 1905.

Robert G. Loucks, Esq., City Attorney, Pomona, Cal.

DEAR SIR: Yours of the 25th instant making enquiries in relation to the above case has been received.

Answering your questions seriatim:

The opinion was rendered on the 18th day of July, 1902, by Honorable James H. Beatty, U. S. District Judge, District of Idaho, holding Circuit Court for this District; it was at a hearing of complainant's application (by order to show cause) for injunction pendente lite, and of defendants' application to dissolve restraining order—heard together; the City of Eureka and members of
471 its council filed demurrer to a part of the Bill and voluminous answers to remainder upon the merits; affidavits of members of the council were filed, five in all, and hearing was upon these pleadings and affidavits. Messrs. Pillsbury and Sutro appeared for complainant, Messrs. Monroe and Weaver appeared for defendants, hearing lasted two days, full argument was made by all counsel and memoranda of points were submitted by both sides.

As to publication of the opinion: Judge Beatty directed that the opinion be not sent to the Federal Reporter; this being his habit with practically all opinions delivered by him when holding our Circuit Court here, except where the hearing is a final one upon the merits.

The opinion is entitled as upon the application of defendants to dissolve restraining order though it was the decision of the Court after hearing both applications as above stated, and the order entered on the Minutes of July 18, 1902, granted the application for injunction and continued the restraining order in force till hearing of cause upon the merits. Writ of Injunction was issued upon July 22, 1902; a Cross-Bill of the City of Eureka was thereafter filed; demurrer thereto was heard and sustained; exceptions of complainant to the answers of defendants were heard before the Master in Chancery and after further proceedings before the Court not necessary to detail here, the cause was on the 11th day of February, 1904, in accordance with a stipulation in that behalf presented and filed, dismissed without costs or damages of any kind to either party.
472 Trusting this will fully advise you in the matter, I am,

Very truly yours,

SOUTHARD HOFFMAN,
Clerk Circuit Court.

[*Forms of Bills, etc.*]

Pacific States Telephone Cos.
Long Distance Telephone.

Charged Long Distance Switch.
No. 35. Date Jan. 22, 1901.
From No. Main 374. Pomona. (Charge.) To No. — Colton.
The actual time occupied in conversation 4 minutes — seconds.
For Our Iine Service Charge — dollars 55 cents.
For Charge — dollars cents.
Total — dollars cents.

[Endorsed in pencil on back:] Loucks Arnold.

Sunset.

Sunset Telephone and Telegraph Co.

Long Distance Telephone.

Executive Office: Telephone Building, San Francisco, Cal.

Main 374.

Please Draw Check to Order of the Company.
Pomona, February 1, 1901.
Collection Address:

ROBERT LOUCKS,
Union Blk.

473 To the Sunset Telephone and Telegraph Company, Dr.

Telephone and Line Rentals, month ending February 28, 1901	1.50
Local (City) Switching, month ending	
Long Distance Service (tickets attached)	.55
Messenger Service	2.05
Labor and material Moving Telephones	

Received Payment for the Company.

G. W. GATES.
Fb./5, 1901.

Bills are payable in advance as per terms of contract.

Pacific States Telephone and Telegraph Co.

Long Distance.

Charged Long Distance Switch.

No. 30. Date Aug. 14, 1901.

From No. Main 374. Pomona. (Charge.) To No. Main 983. Los Angeles.
The actual time occupied in conversatiton 2 minutes 30 seconds.

For Our Line Service	Charge	dollars 25	cents.
For	Charge	dollars	cents.
	Total	dollars	cents.

[Endorsed on back:] Loucks Weight.

474

Sunset.
Sunset Telephone and Telegraph Co.
Executive Office:
Telephone Building.
San Francisco, Cal.

Main 374

POMONA, CAL., *Sept.* 1, 1901.

Please Draw Check to Order of the Company.

Collection Address
Robert Loucks, Union Blk.

To Sunset Telephone and Telegraph Company, Dr.

Telephone and Line Rentals, month ending Sept. 30, 1901...1.50
Local (City) Switching, month ending .....
Long Distance Service (tickets attached) ..... .25
Messenger Service .....
Labor and Material Moving Telephones .....

1.75

Received Payment for the Company.

G. W. GATES,
9-2-01.

Bills are payable in advance as per terms of contract.

475 Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 55. Date Oct. 1, 1901.
From No. Main 374. Pomona. (Charge.) To No. John 3311. Los Angeles.
The actual time occupied in conversation 1 minutes 30 seconds.
For Our Line Service Charge — dollars 25 cents.
For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed on back:] Loucks. Ay.

Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 30. Date Oct. 10, 1901.
From No. Main 374. Pomona. (Charge.) To No. — San Bdno.
The actual time occupied in conversation 2 minutes — seconds.
For Our Line Service Charge — dollars 35 cents.
For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed on back:] Loucks. Sheriff.

476 Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 30. Date Oct. 14, 1901.
From No. Main 374. Pomona. (Charge.) To No. — San Bdno.
The actual time occupied in conversation 1 minutes — seconds.
For Our Line Service Charge — dollars 25 cents.
For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed on back:] Loucks. Rouse.

Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 48. Date Oct. 18, 1901.
From No. Main 374. Pomona. (Charge.) To No. Main 685. Los Angeles.
The actual time occupied in conversation 2 minutes 30 seconds.
For Our Line Service Charge — dollars 25 cents.
For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed on back:] Loucks. Thisby Thorn.

477 Sunset.
Sunset Telephone and Telegraph Co.
Long Distance Telephone.

Executive Office: Telephone Building, San Francisco, Cal.
Main 374.

Please Draw Check to Order of the Company.

POMONA, CAL., *Nov.* 1, 1901.

Collection Address: Robert Loucks, Union Blk.

To Sunset Telephone and Telegraph Company, Dr.

Telephone and Line Rentals, month ending November 30, 1901	1 50
Local (City) Switching, month ending	....
Long Distance Service (tickets attached)	1 10
Messenger Service	....
Labor and Material Moving Telephones	....
	2 60

G. W. GATES,
11-7-01.

Received Payment for the Company,
Bills are payable in advance as per terms of contract.

478 Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 32. Date Mar. 6, 1902.
From No. Main 374. Pomona. (Charge.) To No. — Covina.
The actual time occupied in conversation 1 minutes 45 seconds.
For Our Line Service Charge — dollars 25 cents.

For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed on back:] Loucks. Douglas.

Sunset.

Sunset Telephone and Telegraph Co.
Long Distance.

Executive Office: Telephone Building, San Francisco, Cal.
Main 374.

Please Draw Check to Order of the Company.

POMONA, CAL., *April* 1, 1902.

Collection Address: R. G. Loucks, 153 W. 2d.

479 To Sunset Telephone and Telegraph Company, Dr.

Telephone and Line Rentals, month ending April 30, 1902	1.50
Local (City) Switching, month ending	
Long Distance Service (tickets attached)	
Messenger Service	25
Labor and Material Moving Telephones	
	1.75

Received Payment for the Company,

G. W. GATES,
4-3-02.

Bill are payable in advance as per terms of contract.

Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 53. Date July 17, 1902.

From No. Red 1374. Pomona. (Charge.) To No. Red 1271. Pasadena.

The actual time occupied in conversation 3 minutes 45 seconds.

For Our line Service Charge — dollars 35 cents.
For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed:] Loucks. E. F. Hahn.

480 Sunset.

Sunset Telephone and Telegraph Co.

Long Distance.

Executive Office: Telephone Building, San Francisco, Cal.

Red 1374.

Please Draw Check to Order of the Company.

POMONA, CAL., *August* 1, 1902.

Collection Address: Robt. G. Loucks, 153 West 2d.

To Sunset Telephone and Telegraph Company, Dr.

Telephone and Line Rentals, month ending August 31, 1902	1 50
Local (City) Switching, month ending.....	....
Long Distance Service (tickets attached).....	35
Messenger Service	....
Labor and Material Moving Telephones.....	....
	1 85

Received Payment for the Company,
G. W. GATES,
8/21-02.

Bills are payable in advance as per terms of contract.

481 Draw Checks to Order of the Company.
I. O. B. POMONA.

Sunset Telephone and Telegraph Co.
Long Distance.

RD. 1374.

Loucks, Robert G., 153 W. 2d St.

To Sunset Telephone and Telegraph Company, Dr.

For Telephone Service Month Ending January 31, 1903:

Rental	1.50
Long Distance Service 1 Tickets Attached	.15
Labor and Material Moving Telephones	....
	1.65

Received Payment for the Company,
F. SMITH, *Collector.*
1-10-03.

Bills are payable in advance as per terms of contract.

Charged Long Distance Switch.

Pacific States Telephone and Telegraph Co.
Long Distance.

No. 37. Date Dec. 10, 1902.
From No. Red 1374. Pomona. (Charge.) To No. — Ontario.

482 The actual time occupied in conversation 1 minutes — seconds.
For Our Line Service Charge — dollars 15 cents.
For — Charge — dollars — cents.
Total — dollars — cents.

[Endorsed on back:] O. K. Loucks. Ogle Murphy.

Los Angeles, Calif., Exchange. Telephone No. Red 1374.

M-. R. G. Loucks.
To Sunset Telephone and Telegraph Company, Dr.

No. 7037.

For Long Distance Service during month of May, 1903, as follows:

Date.	From whom.	To whom	At.—	Tolls.	Messenger service.
6th.	Tolfree.	O. K. Loucks.	Red 1374 Pomona.	30	

Draw Checks to Order of the Company.

Sunset Telephone and Telegraph Co.
Long Distance.

1 OB. Pomona.

RD. 1374.

Loucks, Robert G., 153 W. 2d St.

483 Sunset Telephone and Telegraph Company, Dr.

For Telephone Service Month Ending June 30, 1903.

Rental	1 50
Long Distance, Tickets Attached	30
Labor and Material Moving Telephones	....
	1.80

Received Payment for the Company,

F. SMITH, *Collector.*
6-3-3

Bills are payable in advance as per terms of contract.

Pomona Exchange. Telephone No. Red 1374.

M-. R. G. Loucks,

To Pacific States Telephone & Telegraph Co., Dr.

No. 184423.

For Long Distance Service during month of June, 1903, as follows:

Date.	From whom.	To whom.	At—		Tolls.	Messenger service.
16	Loucks.	Mathews.	Main 689	L. A.	25	
28	Loucks.	L. G. Haight.	Redlands.		30	
					.55	

484 Draw Checks to Order of the Company.

Sunset Telephone and Telegraph Co.
Long Distance.

1 OB. Pomona.

RD. 1374.

Loucks, Robert G., 153 W. 2d. St.

To Sunset Telephone and Telegraph Company, Dr.

For Telephone Service Month Ending July 31, 1903:

Rental	
Long Distance Service, Tickets Attached	1.50
Labor and Material Moving Telephones	.55
	....
	$2.05

Received Payment for the Company,

F. SMITH, *Collector.*
7/1/03.

Bills are payable in advance as per terms of contract.

Draw Checks to Order of the Company.

Sunset Telephone and Telegraph Co.
Long Distance.

RD. 1374.

1 OB. Pomona.

Loucks, 153 W. 2d St.

485 To Sunset Telephone and Telegraph Company, Dr.

For Telephone Service Month Ending November 30, 1903:

Rental	
Long Distance Service, Tickets Attached	1.50
Labor and Material Moving Telephones	.25
	....
	1.75

Received Payment for the Company,

F. SMITH, *Collector.*
11/11/3.

Bills are payable in advance as per terms of contract.

Exchange. Telephone Number Red 1374.
Month of October. Bill No. —.

M-. R. G. Loucks,

To Pacific States Telephone and Telegraph Co., Dr.

No. 63659.

For Long Distance Service as Follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
23	Loucks.	Duning	Main 1313. LA	25	

486 Pomona Exchange. Telephone No. Red 641.

M-. Loucks,

To Pacific States Telephone and Telegraph Co., Dr.

A No. 405647.

For Long Distance during month of Apr., 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
26	Loucks.	Ticket ofc.	Main 70. L. A.	25	

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.

Long Distance.

Red 641.

2B. Pomona.

Loucks, Robt. G., W. 2d 12-4.

To Sunset Telephone and Telegraph Company, Dr.

For Telephone Service, Month Ending May 31, 1905:

Rental	1.50
Long Distance Service, Tickets Attached	.25
Labor and Material Moving Telephones	....
	1.75

Received Payment for the Company, F. SMITH, *Collector.*
5/23/5.

Bills are payable in advance as per terms of contract.

487 Pomona Exchange. Telephone No. Red 641.

M-. Loucks,

To Pacific States Telephone and Telegraph Company, Dr.

A. No. 227941.

For Long Distance Service, during month of Jul-, 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service
26	Loucks.	Rhodes.	Chino.	25	
26	Tibo Chino—O. K.	Loucks.	Pomona.	25	
				50	

Drew Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

Red 641.

2B. Pomona.

Loucks, Robt. G., W. 2d. 12-4.

To Sunset Telephone and Telegraph Company, Dr.

For Telephone Service, Month Ending Aug. 31, 1905:

Rental	
Long Distance Service, per Attached	1.50
Labor and Material Moving Telephones	.50
	....
	2.00

Received Payment for the Company,

F. SMITH, *Collector.*
8/5/7.

Bills are payable in advance as per terms of contract.

488 An envelope addressed as follows:

Pacific States Telephone and Telegraph Co.
Long Distance.
Telephone and Telegraph Company.

F. G. LOUCKS,
Pomona.

No. —.
Charges Paid.

A telegram addressed as follows:

1:50 p. m. 10 pd. 60¢.

Pacific States Telephone and Telegraph Co.
Long Distance.

Received by Telegram from F. G. Loucks, Pomona.

PORTLAND, ORE., *Aug.* 22, 1905.

Please write me particulars, action against Telephone Company. Much interested.

RICHARD N. MONTAGUE.

Expansion.

It is the purpose of the management to extend the use of the telephone to every town no matter how small, throughout the Pacific States, and in all of the cities and towns, to put a telephone, at the most reasonable rates, within easy and immediate reach of every person whose income is sufficient to permit him to ride on street-cars.

489 Pacific States Telephone and Telegraph Co.
Long Distance.

Please Come to Our Office.

OCT. 26, 1905—3:15 p. m.

To Robt. Loucks:

Mr. —— ——, at Orange, requests communication with you by Telephone, and wishes you to call at our office at once or nearest phone.

Messenger will leave this notice.

Expansion.

It is the purpose of the management to extend the use of the telephone to every town no matter how small, throughout the Pacific States, and in all of the cities and towns, to put a telephone, at the most reasonable rates, within easy and immediate reach of every person whose income is sufficient to permit him to ride on street-cars.

Pacific States Telephone and Telegraph Co.
Long Distance.

Please Come to Our Office.

OCT. 28, 1905—9:40 a. m.

To Robt. G. Loucks:

Mr. —— ——, at Los Angeles, requests communication with you by Telephone, and wishes you to call at our office at once or nearest phone.

Messenger will leave this notice.

490 Pacific States Telephone and Telegraph Co.
Long Distance.

Expansion.

It is the purpose of the management to extend the use of the telephone to every town no matter how small, throughout the Pacific States, and in all of the cities and towns, to put a telephone, at the most reasonable rates, within easy and immediate reach of every person whose income is sufficient to permit him to ride on street-cars.

—— —, 190–.

Sunset Telephone and Telegraph Company—Exchange Subscription.

Terms and Conditions.—The Licensor and Lessor hereunder is the Sunset Telephone and Telegraph Company, a corporation created under the laws of the State of California, and hereinafter designated as the Company. The instruments and lines on the subscriber's premises shall be carefully used, and only as herein stated; all ordinary expense of maintenance and repair shall be borne by the Company; the subscriber shall pay $10 for each telephone or call box destroyed otherwise than by unavoidable accident, and $25 per month in case of unauthorized removal or detention, until its destruction or its loss, without his fault is satisfactorily proved; but the payment shall not confer any title to the instrument
491 or right to use it. In case communication is interrupted, from any cause whatever the only liability of the Company shall be to abate the rent during such interruption, after twenty-four hours' written notice thereof to the Company. The Company will remove the instruments from place to place during the term within the territory covered by the Exchange lines, upon request and payment of the expense thereof. Upon non-payment of any sum due, or any use of the instruments on said premises improper or contrary hereto, or any removal therefrom the Company may terminate the subscriber's rights by written notice served on him or any occupant of the premises, and sever his connection and remove the instruments; and for this purpose and for inspection it and its servants may have access thereto.

The right of the subscriber is to use the instruments and connecting wires where the Company may place them, under such rules as the Company may from time to time prescribe, for the purpose of personal communication with the Exchange and with parties whom the Company may connect with him for that purpose, upon his or their business; they are not to be used by any persons other than subscribers of the Company, or for any toll or consideration to be paid by any person other than the subscriber, nor for performing any part of the work of collecting, transmitting, or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the Company, nor
492 for transmitting market quotations or news for sale, publication or distribution, nor for calling messengers except

from the central office, or performing any other service in competition with service which the Company may undertake to perform. Said instruments are the property of the American Bell Telephone Company, are constructed and used under its patents, and are leased and licensed by it, through said Sunset Telephone and Telegraph Co., only for the uses above stated, in consideration of a royalty and rental which it is to receive therefor, part of the payment named below, and which the Company is authorized to collect for a period not exceeding one year in advance; but any use otherwise or without the payment of said rental or royalty is also an injury to and an invasion of the said rights of the American Bell Telephone Company, entitling it to an injunction and other legal redress in a suit in its name and behalf, and to the remedies, by taking possession of instruments and lines, and collecting rentals from the subscribers, as provided in the contract between the Company and the Sunset Telephone and Telegraph Company, and which the subscriber agrees to permit and to pay.

In view of the liability to errors in transmitting of oral messages by telephone, and the impossibility of fairly fixing the cause thereof, the subscriber assumes all the risk of errors from misconnections or mistakes upon and by any telephone line, and the officers and servants thereof, in transmitting, receiving or delivering
493 messages; and in respect of any messages which may be sent or received by or for him over any other telephone or telegraph line, no line shall be responsible for defaults occurring on any other line, nor on its own lines except as specified in its usual contracts, nor for any damages unless the claim therefor be presented in writing within thirty days after sending the message, and he makes the Company, and every other line over which said message may pass, his agent to receive the same, to forward it towards its destination at the rate of unrepeated messages, and for that purpose to bind him by the contracts on the usual blanks and make the message subject to the usual limitations, rules and regulations, to which he hereby agrees. He will reimburse the Company for all tolls it may pay on such messages. For loss or damage that occurs in the course of employment of any messenger it shall not be liable beyond twenty times the charge made for such messenger service.

All the obligations hereof are binding on the subscriber until the instruments shall be re-delivered to the Company or the American Bell Telephone Company, or until, being bound and requested and having an opportunity to remove the same, they shall neglect to do so. All words herein referring to the subscriber shall be taken to be of such number and gender as the character of the subscriber may require.

The subscriber requests the Sunset Telephone and Telegraph Company to place in his premises (Business—Residence)
494 West Second Street, one set of Standard Telephone Instruments, and connect them (by metallic circuit) on a two party line for his use with the Company's Exchange, Pomona until the first day of October, 1903, upon the terms and conditions stated

above, which he hereby promises to keep and perform, and pay therefor One & 50/100 Dollars, in advance, on the first day of each and every month during said term commencing as soon as the instruments shall be placed and connected. This rate includes exchange switches in each month. And further agrees to pay to said Company — Cents for each exchange switch beyond the allowance. All switches to points outside of this Exchange to be paid for at schedule rates. Bills for said service to be paid monthly.

Contracts made for ten-party line service are subject to the further condition that the total number of incoming and outgoing switches shall not exceed any average of ten per day for each month.

It is further agreed that no local continuous conversation shall exceed five minutes.

The subscriber or any other user shall not make use of foul, abusive or profane language, or personate any other individual with fraudulent intent over the wires connected with his instruments.

This request becomes a binding contract as soon as accepted by the Company, or by furnishing said instruments. Its terms cannot be varied nor waived by any representations or promises of any canvasser or other person, unless the same be in writing, and
495 signed by the General Manager. The subscriber acknowledges that he has received a duplicate hereof.

Signed at Pomona, —— —, 1902.

Accepted by the Sunset Telephone and Telegraph Company.

—— ——,

By —— ——.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of Robert G. Loucks. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Room- 2 and 3, Union Block, W. 2d St., Pomona, Cal.

Affidavit of F. H. Osler.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA (a Municipal Corporation), and Others, Respondents.

496 UNITED STATES OF AMERICA,
County of Los Angeles, State of California, ss:

F. H. Osler, being first duly sworn, deposes and says: I am now, and for more than thirteen years last past, have been a resident of

the City of Pomona, California, and of the County of Los Angeles in said State; that I am the party mentioned and referred to in the annexed bills, which have monthly been presented to me, as shown by said monthly receipts, from January 1st, 1905, to November 1st, 1905, the said bills having been receipted by Frank Smith in the following manner: All local rentals, for purely local telephonic business, were in each case charged by, and paid to, said Frank Smith for the Sunset Telephone and Telegraph Company, and in all cases of sending or receiving long distance telephonic messages to any place without the said City of Pomona, that said long distance telephonic messages, as per reference to receipts, were charged by and paid to said Frank Smith for the Pacific States Telephone and Telegraph Company; that the annexed bills are the original bills presented by said Smith and are true and correct, and represent the amount of money paid by me during said period, and are particularly true in regard to the various places in which, during said period, I held the many and various communications with outside towns by long distance wires.

That I am familiar with the general commercial business
497 actually done by both the Sunset Telephone and Telegraph Company and the Pacific States Telephone and Telegraph Company in the City of Pomona, and that from my observation and use of said telephonic instruments, do know that the said companies and both of them, actually do nothing but a regular telephone business, and that they, or neither of them, actually and regularly do a commercial telegraph business; that the commercial telegraph business in the City of Pomona is done by the Western Union Telegraph Company and the Postal Telegraph Company; that I have never sent a telegraph message either over the Pacific States or the Sunset Telephone and Telegraph wires, but in each case where I had a telegram to send I always took it either to the Western Union office, or to the Postal Telegraph office; and so far as I know, and from common knowledge and the general practice of my friends and other citizens and residents of Pomona, it has always been their continued and constant practice to take such telegraph messages to either the Western Union or the Postal Telegraph offices and not to the offices of the Sunset or Pacific States Telephone and Telegraph Company.

F. H. OSLER.

Subscribed and sworn to before me, this 17th day of November, 1905.

[SEAL.]

U. E. WHITE,
Notary Public in and for the County of Los Angeles, State of California.

498 [*Bills for Telephonic Business.*]

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Company.

Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491 2B. Pomona.

For Telephone Service Month Ending Jan. 31, 1905.

Osler, F. H., 3d & Thomas, 9-4.

Rental	1.50
Long Distance Service. Tickets Attached	5.20
Labor and Material Moving Telephones	....
	6.70

Received Payment for the Company.

F. SMITH, *Collector.*
1/4/5,

Bills are payable in advance as per terms of contract.

Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 524928.

499 For Long Distance Service during month of Dec., 1904, as follows:

Date.	From whom.	To whom.	At.	Tolls.	Messenger service.
3.....	Osler.....	Booth.....	Main 134 L. A....	25	
3.....	Osler.....	Order Clerk.....	Main 661 L. A....	25	
3.....	Osler.....	Prescott.....	Ex. 90 L. A.....	25	
5.....	Griffith (O. K. Watts)	Mills.....	Riverside.....	25	
13.....	Osler.....	Lacy.....	Main 196 L. A....	25	
13.....	Osler.....	Order Clerk.....	Main 1347 L. A...	25	
13.....	Osler.....	Dostal.....	Redlands	25	
14.....	Osler.....	Iron Dept.....	Main 302 L. A....	25	
15.....	Osler.....	Lacy.....	Main 196 L. A....	25	
16.....	Osler.....	Abbott.....	Main 302 L. A....	25	
21. ...	Osler.....	Order Clerk.....	Main 645 L. A....	25	
22.....	Osler.....	Gregory.....	Main 958 L. A....	25	
23.....	Osler.....	Corona Bookkeeper.	O. K. Osler Pom..	25	
24.....	Osler.....	Gregory.....	L. A. 5 min.....	45	
24.....	Osler.....	Gregory.....	L. A. 5 min.....	25	
24.....	Osler.....	Gregory.....	L. A. 5 min.....	25	
27.....	Bookkeeper L. A.	O. K. Osler.....	Red 491 Pomona..	25	
28.....	Osler.....	Hewett.....	Riverside.....	25	
30.....	Osler.....	Gregory.....	Main 958 L. A....	25	
31.....	Osler.....	Lewis.....	Main 1282 L. A...	25	
				5.20	

500 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.

Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B. Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service month ending Feb. 28, 1905:

Rental	1.50
Long Distance Service, Tickets Attached	3.35
Labor and Material Moving Telephones	....
	4.85

Received Payment for the Company,

F. SMITH, *Collector.*
2/3/5.

Bills are payable in advance as per terms of contract.

Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 605822.

501 For Long Distance Service during month of Jan., 1905, as follows:

Date.	From whom.	To whom.	At.	Tolls.	Messenger service.
6	Osler,	Hall.			
10	Osler,	Mgr. Graham Co.	Red 2131 Riverside	25	
12	Osler,	Gregory	Redlands	25	
16	Osler,	Hewett	Los Angeles	25	
16	Osler,	Clantell	Riverside	25	
16	Osler,	Lacy	Jas. 4631 L. A.	25	See
23	Osler,	Hewett	Main 196 L. A.	25	
23	Osler,	Order Clerk	Riverside	30	
23	Osler,	Gregory	L. A.	25	
26	Osler,	Order clk.	L. A.	30	
26	Osler,	Anderson	Main 603 L. A.	25	
28	Osler,	Price clk.	San Bdno Special	25	
30	Osler,	Coe-	Main 1347 L. A.	25	
			Cotton	25	
				3.35	

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Bk. 491. 4R. Pomona.

Osler, F. H., Main & 5th, 10-4.

For Telephone Service month ending Mar. 31, 1905:

Rental	1.00
Long Distance Service, Tickets Attached	.25
Labor and Material Moving Telephones	....
	1.25

Received Payment for the Company,

F. SMITH, *Collector.*
3/13/5.

Bills are payable in advance as per terms of contract.

502

Pomona Exchange.

Telephone No. 491 Bk.

M-. Osler,

To Pacific States Telephone and Telegraph Co., Dr.

A. No. 605534.

For Long Distance Service during month of Feb., 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
24	Osler, F. H.	O. K. Osler.	Pomona.	25	

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B. Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service month ending Mar. 31, 1905:

Rental	1.50
Long Distance, Tickets Attached	2.00
Labor and Material Moving Telephones	....
	3.50

Received Payment for the Company,

F. SMITH, *Collecior.*
3/13/5.

Bills are payable in advance as per terms of contract.

503 Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone and Telegraph Co., Dr.

A. No. 605725.

For Long Distance Service during month of Feb., 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls	Messenger service.
2	Osler,	Arry	Main 11 Chino	25	
2	Coe Corona	O. K. Osler	Red 491 Pomona	25	
3	McGuire—O. K.	Watts Mrs. McGuire	South 199 L. A.	25	
10	Osler,	Order clk.	Main 1347 L. A.	25	
10	Osler,	Order clk.	Main 1347 L. A.	25	
16	Osler,	Hewett	Riverside	25	
18	Osler,	Lacy	Main 196 L. A.	25	
23	Osler,	Salesman	Ex. 124 L. A.	25	
				2.00	

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B. Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service month ending Apr. 30, 1905:

Rental	1.50
Long Distance Service, Tickets Attached	2.65
Labor and Material Moving Telephones	....
	4.15

Received Payment for the Company,

F. SMITH, *Collector.*
4/3/5.

Bills are payable in advance as per terms of contract.

504

Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 605774.

For Long Distance Service during month of ——, 190–, as follows:

8....	Osler.....	Gregory.....	Main 958 L. A....	25
18....	Osler.....	Mgr.....	Main 1502 L. A...	25
20....	Osler.....	Crawford	Ont.....	15
20....	Paul Upland O. K. Osler.....		Pomona.....	15
23....	Robinson Corona O. K. Osler.....		Pomona.....	25
24....	Coe—Corona—O. K. Osler.....		Pomona.....	25
24....	Osler.....	Arry.....	Main 1282 L. A...	25
25....	Osler.....	Gregory.....	Main 958 L. A. 4 min.	35
28....	Osler.....	Mgr.....	Ex. 7 L. A.....	25
28....	Coe Corona	O. K. Osler.....	Pomona.....	25
31....	Daisy Fairholm	O. K. Osler.....	Mr. Ruth Chino..	25
				2.65

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service, Month Ending May 31, 1905:

Rental	1 50
Long Distance Service, Tickets Attached.....	2 70
Labor and Material Moving Telephones.....	....
	4 20

505 Received Payment for the Company.
F. SMITH, *Collector.*
5/8/5.

Bills are payable in advance as per terms of contract.

Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 405638.

For Long Distance Service during month of Apr. 1905, as follows:

Date.	From whom.	To whom.	At.	Tolls.	Messenger service.
10....	Osler.....	Order Clk.....	Ex. 124 L. A...	25	
13....	Osler.....	Foundry & Machine Wks.	Riverside.....	25	
14....	Osler.....	Parkhurst.....	Ex. 92 L. A....	25	
17....	Osler.....	Hunsaker.....	Riverside.....	25	
19....	Osler.....	Hewitt.....	Riverside 2 Min.	35	
19....	Osler.....	Hewitt.....	Riverside 2 Min.	35	
19....	Osler.....	Anderson.....	San Bdno	25	
21....	Osler.....	Arry.....	Main 1347 L. A.	25	
21....	Osler.....	Order clerk.....	Main 1347 L. A.	25	
22....	Osler.....	Johnson.....	Main 902 L. A..	25	
				2.70	

506 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service, Month Ending June 30, 1905:

Rental	1 50
Long Distance Service, Tickets Attached.....	5 10
Labor and Material Moving Telephones.....	....
	6 60
Rebated.....	40
	6 20

Received Payment for the Company.
F. SMITH, *Collector.*
6/2/5.

Bills are payable in advance as per terms of contract.

507 Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 338938.

For Long Distance Service During month of May, 1905, as follows:

Date.	From whom.	To whom.	At.	Tolls.	Messenger service.
6....	Osler.....	*Hewlitt*.....	Riverside.....	25	
8....	Osler.....	Arry Foundry....	Riverside.....	25	
8....	Osler.....	*Hewlitt*.....	Riverside.....	25	
8....	Osler.....	Church	Main 1282 L. A....	25	
9....	Osler.....	Foundry.....	Riverside.....	25	
11....	Osler.....	Lewis	Main 1282 L. A. 7 min.	65	
11....	Osler.....	Harper	Ex. 90 L. A.....	25	
13....	Osler.....	Lewis.....	Main 1282 L. A....	25	
15....	Osler.....	Hewitt	Riverside 1:30.....	30	
16....	Osler.....	Hewitt.....	Riverside 1:30.....	30	
17....	Osler	Chino O. K. Trundle.....	Pomona	25	
20....	Osler.....	Lewis.....	Main 1282 L. A....	25	
23....	Osler.....	Newton.....	Corona.....	25	✓
29....	Osler.....	Ducommon.....	Main 603 L. A.....	25	
29....	Osler.....	Holman	Main 1141 L. A....	25	
29....	Osler.....	Ducommon.....	Main 603 L. A.....	25	
31....	Osler.....	Hewitt.....	Riverside 2 min...	35	
31....	Osler.....	Parkhurst.....	Ex. 92 L. A.....	25	
				5.10	

Written on the back as follows: Route 2.

508 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service, Month Ending July 31, 1905:

Rental	1 50
Long Distance Service, per Attached.....	2 45
Labor and Material Moving Telephones.....	....
	3 95

Received Payment for the Company.

F. SMITH, *Collector.*
7/3/5.

Bills are payable in advance as per terms of contract.

Pomona Exchange.

Telephone No. 491 Red.

M-. F. H. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 261438.

For Long Distance Service during month of Jun-, 1905, as follows:

Date.	From whom.	To whom.	At.	Tolls.	Messenger service.
3....	Gustanson...	Arry...	Main 1240 L. A....	25	
6....	Osler.....	Ruth.....	Chino.....	25	
7....	Osler.....	Newton	Corona 10 min.....	95	35
16....	Miss Watts..	Mrs. Bothinck...	Riverside.....	25	
26....	Coe—Corona O. K. Osler..		Pomona.....	40	
				2.45	

509 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service, Month Ending Aug. 31, 1905:

Rental	1 50
Long Distance Service, per Attached.....	3 75
Labor and Material Moving Telephones.....	....
	5 25

Received Payment for the Company.

F. SMITH, *Collector.*
8/7/5.

Bills are payable in advance as per terms of contract.

510 Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 227935.

For Long Distance Service during month of Jul-, 1905, as follows:

Date.	From whom.	To whom.	At.	Tolls.	Messenger service.
3....	Osler.....	Lacy.....	Main 196 L. A..	25	
7....	Osler.....	Parkhurst.....	Ex. 92 L. A....	25	
8....	Osler.....	Hewitt.....	Riverside	25	
10....	Osler.....	Ducommon.....	Main 603 L. A..	25	
10....	Osler.....	Lacy.....	Main 196 L. A..	25	
11....	Osler.....	Lewis.....	Main 1282 L. A.	25	
12....	Osler.....	Reynolds.....	Ex. 90 L. A.....	25	
12....	Osler	Hewitt.....	Riverside	50	
22....	Osler.....	Smiley Fridalby via Highlands (private line chgs. only)...		25	
29....	Longmyer.	Highlands O. K.		25	
	Hunsaker	.....	Pomona..... ..		25
30....	Mrs. Osler.	Smiley.....	Highlands.....	25	
31....	Dobbs.....	Riverside O. K. Osler.....	Pomona.....	25	
31....	Osler.....	Peters.....	L. A.....	25	
				3.75	

511 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service, Month Ending Sept. 30, 1905:

Rental	1 50
Long Distance Service, per Attached.....	2 45
Labor and Material Moving Telephones.....	....
	3 95

Received Payment for the Company.

F. SMITH, *Collector.*
9/20/5.

Bills are payable in advance as per terms of contract.

Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Company, Dr.

No. 914432.

For Long Distance Service during month of Aug. 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
1....	Smiley-Highlands	O. K. Osler...	Pomona.....	25	
1....	Osler.....	Harper.....	Ex. 90 L. A.....	25	
7....	Osler.....	Church.....	Main 1282 L. A....	25	
15....	Osler Highland	O. K. Hunsaker..	Pomona.....	25	
17....	Hunsaker....	Osler.....	Fridalba Park.....	45	25
22....	Osler, Highlands	O. K. Osler....	Pomona.....	25	
25....	Osler, Colton	O. K. Hunsaker...	P. M.....	25	
28....	Osler.....	Longmeyer.....	Highland	25	
				2.45	

O. K. OSLER.

512 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

Red. 491. 2B. Pomona.

Osler, F. H., 3d & Thomas, 9-4.

To Sunset Telephone and Telegraph Company, Dr.

For Telephone Service, Month Ending Oct. 31, 1905:

Rental	1 50
Long Distance Service per Attached.....	1 45
Labor and Material Moving Telephones.....	
	2 95

Received Payment for the Company,

F. SMITH, *Collector.*
10/21/5.

Bills are payable in advance as per terms of contract.

Pomona Exchange.

Telephone No. 491 Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 441227.

For Long Distance Service during month of Sep., 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
7....	Osler.....	Order Clerk.....	Ex. 65 L. A.....	25	
9....	Osler.....	CharlieLongmeyer	Highlands.....	35	
18....	Osler, L. A. O. K.	Hunsaker.....	Pomona.....	25	
29....	Osler.....	Townsend.....	Main 347 L. A....	25	
30....	Hunsaker....	Townsend.....	Main 347 4 min...	35	
				1.45	

513

Pomona Exchage.

Telephone No. 491 Blk.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 475533.

For Long Distance Service during month of Sep., 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
12....	Osler, Upland O. K.	Mrs. Osler..	Pomona.....	15	

Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.
Long Distance.

To Sunset Telephone and Telegraph Company, Dr.

Bk. 491. 4R. Pomona.

Osler, F. H., Main & 5th, 10-4.

For Telephone Service, Month Ending Oct. 31, 1905:

Rental	1 00
Long Distance Service per Attached.....	15
Labor and Material Moving Telephones.....	....
	1 15

Received Payment for the Company,

F. SMITH, *Collector.*
10/21/5.

Bills are payable in advance as per terms of contract.

514 Draw Checks to Order of the Company.

Pacific States Telephone and Telegraph Co.

Long Distance.
To Sunset Telephone and Telegraph Company, Dr.

Red 491. 2B. Pomona.

Osler, F. H., 3d & Thomas, 9-4.

For Telephone Service, Month Ending Nov. 30, 1905:

Rental	1 50
Long Distance Service per Attached	....
Labor and Material Moving Telephones	3 75
	5 25

Received Payment for the Company,

F. SMITH, *Collector.*
11/1/5.

Bills are payable in advance as per terms of contract.

515 Pomona Exchange.

Telephone No. 491, Red.

M-. Osler,

To Pacific States Telephone & Telegraph Co., Dr.

A. No. 441434.

For Long Distance Service during month of Oct., 1905, as follows:

Date.	From whom.	To whom.	At—	Tolls.	Messenger service.
2....	Miss Watts....	Hunsaker.....	Main 347 L. A.....	25	
4....	Hunsaker.....	Order Cl'k	Ex. 65 L. A.....	25	
7....	Hunsaker.....	Foreman.....	Main 902 L. A.....	25	
10....	Hunsaker.....	Morely.....	Riverside.....	30	
12....	Hunsaker.....	Foreman.....	Main 902 L. A.	25	
18....	Hunsaker.....	Foreman.....	Main 902 L. A.....	25	
18....	Mrs. Naylor O. K. Osler—Mrs. Houser.....		L. A.....	25	
24....	Osler.....	Johnson.....	Main 902 L. A.	25	
24....	Osler.....	Miller.....	Riverside 2:30.....	40	
25....	Osler.....	Miller.....	Riverside 4 Min....	55	
27....	Osler.....	Parkhurst.....	Ex. 92 L. A.....	25	
27....	Osler.....	Johnson.....	Main 902 L. A.....	25	
31....	Osler.....	Gregory	Main 6969 L. A.....	25	
				3.75	

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of F. H. Osler. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 and 3, Union Block, W. 2d St., Pomona, Cal.

516 In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Second Affidavit of A. N. Harris, City Clerk.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

A. N. Harris, being first duly sworn, deposes and says: That I am now, and for more than twenty years last past have been a resident of the City of Pomona, in the County of Los Angeles, State of California.

That I am now and have been since the 20th day of April, 1903, the duly elected, qualified and acting City Clerk of the City of Pomona;

That on or about the 16th day of September, 1905, I made a careful examination of all the minutes and records of the Board of Trustees of said City of Pomona, for the past ten years, including all the minutes and records of said Board, from the 1st day of September, 1895, continuously down to and including all subsequent records to September 1st, 1905;

517 That upon such careful examination I do not find any record or any reference or any resolution or ordinance, or reference to any resolution or ordinance in any of said minutes or records granting, or purporting to grant to said complainant company any franchises, rights, or privileges whatsoever to use or occupy the streets of said City of Pomona.

A. N. HARRIS.

Subscribed and sworn to before me, the 21st day of November, 1905.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Second Affidavit of City Clerk. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 and 3, Union Block, W. 2d St., Pomona, Cal.

518 In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH CO. (a Corporation), Plaintiff,
vs.
CITY OF POMONA (a Municipal Corporation), and Others, Respondents.

Affidavit [of Arthur B. Fry].

THE UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Arthur B. Fry, being first duly sworn, deposes and says: That for four years last past he has been a resident of the City of Los Angeles, County of Los Angeles, State of California. That in the year, 1892, he began a course in electrical engineering in the Purdue University, at Lafayette, Indiana, and graduated therefrom and finished a four year course in said university in the year 1896; that from the year 1898 to the year 1901, inclusive, he was employed in the Central Union Telephone Company, a Bell telephone corporation, in the said City of Indianapolis, Indiana, and while there was engaged in installing telephone instruments, and also in the work of telephone wire chief; that from October, 1902, to April, 1903, he was in the inspection department of the Department of Electricity of the City of Los Angeles, and was employed and
519 engaged in said inspection department of the said Department of Electricity by said City of Los Angeles. That he now and has been continuously since April, 1903, Superintendent of equipment in the office of the Home Telephone Company in the City of Los Angeles.

That he has carefully read the affidavit of Charles L. Zahm, an expert telephone engineer, which Zahm affidavit has been heretofore made in this action, and that he is familiar with all the technical points involved in said affidavit in regard to telephonic and telegraphic construction; and affiant says that from the best of his knowledge and belief, he believes all the technical matters and things therein stated in said Zahm affidavit in regard to telephonic and telegraphic instruments, apparatus and construction, to be true and accurate in every detail.

ARTHUR B. FRY.

Subscribed and sworn to before me this 24th day of November, 1905.

[SEAL.] LUCY E. WHEELER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of Arthur B. Fry. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 and 3, Union Block, W. 2d St., Pomona, Cal.

520 In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH CO. (a Corporation), Plaintiff,
vs.
CITY OF POMONA (a Municipal Corporation), and Others, Respondents.

Affidavit [of Mrs. Gertrude Warren.]

THE UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Mrs. Gertrude Warren, being first duly sworn, deposes and says, that I am now and for more than seven years last past have been a resident of the City of Los Angeles in the County of Los Angeles, State of California;

That *on* or about the month of December, 1898, I became engaged by, and was in the employ of the Sunset Telephone & Telegraph Company; that I was in the employ of said company for six years; the first two years as operator in the West office, and the subsequent four years as ticket clerk in the Main office of said Sunset Telephone & Telegraph Company, located on Second street in the said City of Los Angeles;

521 That as such ticket clerk I became familiar with and knew the long distance business done in said office; that about the middle of the year 1900, I noticed that a new company, to wit, Pacific States Telephone & Telegraph Company had come into part management in the said main office, and that all, or nearly all of the stationery, paper and envelopes, used by me in said office from about said year 1900, was printed in the name of said Pacific States Telephone & Telegraph Company; that subsequent to this date, to wit, *on* or about the fore part of the year 1903, another general change was made throughout the office in regard to all long distance telephone work.

That from said fore part of the year 1903, and continuously and subsequent thereto, and as long as I remained in said long dis-

tance office, all of the long distance bills were made upon a separate sheet, and charged and attached to the regular monthly bill of the local telephone subscriber; that the Pacific States Telephone & Telegraph Co. long distance bill then used was the same form and number, being Form P. S. 178, as that which is attached to the affidavit of Robt. G. Loucks formerly made in this case.

That *on* or about the middle of the year 1902, at the South office of the said Sunset Telephone & Telegraph Company, or Pacific States Telephone & Telegraph Company, in said city, Mr. C. M. Seeley, the City Manager of said companies, asked me for information in regard to the amount of local work in said office as compared with the long distance telephone work in said office, and he then and there informed me that as the work was about
522 evenly divided between the said Pacific States Telephone & Telegraph Company, and said Sunset Telephone & Telegraph Company, that they were compelled to and did keep two salary book accounts, and that one-half of the salaries of all employees engaged in ticket work were paid by the Pacific States Telephone & Telegraph Company, and that the other half of the salaries of said employees was paid by said Sunset Telephone & Telegraph Company.

That from about the beginning of the year 1903 a toll sheet, or blank daily report sheet for all long-distance telephone messages was used in said joint office, and that said toll sheet contained the name of the Pacific States Telephone & Telegraph Company, and was also written in full across the face of said daily toll sheet, and that said daily report from the beginning of said year 1903, down to the month of February, 1904, at which time I severed my connection with said joint companies, was the regular form of toll sheet used by said joint companies at said office in the City of Los Angeles.

That from my knowledge of said office and its work, and the nature of the telephonic messages received and transmitted therefrom and therein, I am thoroughly convinced that the Pacific States Telephone & Telegraph Company is the long-distance or toll company, having exclusive charge and control of all long-distance telephonic messages; and that said Sunset Telephone & Telegraph Company is the local or short distance company operating in the City of Los Angeles, and that it has exclusive charge of all such local
523 telephonic service in said City of Los Angeles, and in other points throughout Southern California in which it operates.

MRS. GERTRUDE WARREN.

Subscribed and sworn to before me this 1st day of December, 1905.

[SEAL.] LUCY E. WHEELER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et

al., Respondents. Affidavit of Mrs. Gertrude Warren. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3, Union Block, W. 2d St., Pomona, Cal.

In the United States Circuit Court of the Ninth Judicial *District*, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH Co. (a Corporation), Plaintiff,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

524 *Affidavit [of C. H. Temple].*

THE UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

C. H. Temple, being first duly sworn, deposes and says: That he is now, and for three years last past has been, a resident of the State of California, and for more than two years last past has been a resident in the City of Los Angeles, said State of California; that for eight years last past he has been engaged in all branches of telephone work; that for one year—from 1899 to 1900—he was wire chief of the Gordon Telephone Company in the City of Charleston, State of South Carolina; that he was the superintendent of telephone construction and constructed the rebuilding of the switchboard plant of the Home Telephone Company in the City of Richmond, Indiana, in the year 1901; that he was superintendent of construction and constructed the additional capacity of the plant of the Home Telephone Company at the City of Redlands, in the State of California, which work began in April, 1904, and ended in April, 1905.

That he has carefully read the affidavit of Charles L. Zahm, an expert telephone engineer, which Zahm affidavit has been heretofore made in this action, and that he is familiar with all the technical points involved in said affidavit in regard to telephonic and telegraphic construction; and affiant says that from the best of his knowledge and belief, he believes all the technical matters
525 and things therein stated in said Zahm affidavit in regard to telephonic and telegraphic instruments to be true and accurate in every detail.

C. H. TEMPLE.

Subscribed and sworn to before me this 24th day of November, 1905.

[SEAL.] LUCY E. WHEELER,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Divison. Sunset Telephone and

Telegraph Co , a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of C. H. Temple. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3, Union Block, W. 2d St., Pomona, Cal.

[*Affidavit of D. S. Parker.*]

In the United States Circuit Court of the Ninth Judicial *District*, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

526 UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

D. S. Parker, being first duly sworn, deposes and says:

That I am now, and for eighteen years last past have been, a resident of the City of Pomona in the County of Los Angeles, State of California;

That I am now, and for three and one-half years last past have been, the Superintendent of Construction of the telephone plant in said city, constructed by the Pomona Valley Telephone and Telegraph Union, and have been its manager ever since its organization in said city;

That *on* or about March or April, 1903, while I was engaged in constructing lines of said Pomona Valley Telephone and Telegraph Union, on Center Street, near Main Street, in said City of Pomona, California, I was approached and met by one Corcoran, who stated to me that he was the Superintendent of Construction of said complainant company;

That *on* or about that time, said complainant company was making arrangements for the removal of their poles and wires from the paved portion of Second Street, and approached me in regard to making an arrangement by which the complainant company might have the joint use of certain pole lines, owned and controlled by the Pomona Valley Telephone and Telegraph Union;

527 That as the said conversation continued, we walked on Center Street to Ellen Street, and that about that time I suggested that they reciprocate by allowing us the use of certain poles then occupied by the complainant company on Ellen Street; and Mr. Corcoran—after some further conversation—objected to the proposition, stating that it was impossible to give us the use of said poles on Ellen Street, because and for the reason that the said poles were used jointly by the Sunset Telephone and Telegraph Company and the Pacific States Telephone and Telegraph Company; he stated that the Pacific States Telephone and Telegraph Company were

doing the long distance business here and the Sunset Telephone and Telegraph Company were doing the local business, and that the use of said poles by a third company would induce so many complications that the arrangement suggested would be impossible to bring about; after some further conversation along the same line, the matter was dismissed as being impossible of consummation;

That said Pomona Valley Telephone and Telegraph Union has an arrangement with the Western Union Telegraph Company, a corporation, for the receipt and delivery, by telephone transmission, of telegrams received or transmitted over the Western Union wires in Pomona to and from outside cities, and that said service given by said Pomona Valley Telephone and Telegraph Union is considered no part of the telegraph service rendered by said Western Union Telegraph Company to its patrons in the City of Pomona;

528 but said telephonic service rendered by said Pomona Valley Telephone and Telegraph Union is simply to act as and take the place of messenger for the local delivery in said city of any or all messages that may be received by or offered to said Western Union Telegraph Company;

That said Western Union Telegraph Company does a strictly commercial telegraph business in the City of Pomona, and does in said city no telephone business whatsoever; and that the local lines of said Pomona Valley Telephone and Telegraph Union are separate and distinct from the lines, wires, control and management of said Western Union Telegraph Company;

That said Pomona Valley Telephone and Telegraph Union does strictly and only a telephone business within the said City of Pomona, similar to and the same as that done by said complainant company in said City of Pomona; and that said Pomona Valley Telephone and Telegraph Union does no telegraph or telegraphic business whatsoever in said city, or other local or telegraph business over its local wires said telegraph service being impossible in this case the same as in the case of Sunset Telephone and Telegraph Company, because and for the reason that lines of both said companies are constructed for telephonic service or for the transmission of articulate speech only; and for all business and commercial purposes in said city, neither of said companies have in the residences and offices of subscribers any telegraphic instrument whatsoever;

529 That I have carefully read the affidavit of Charles L. Zahm, heretofore made in this case, and that as to the technical points stated in said affidavit—to the best of my knowledge and belief—I believe the same to be true; and that as to all facts and conditions existing in said City of Pomona, I am generally familiar with the same and believe them also to be true, to the best of my knowledge and belief;

That the telephone instruments used by said complainant company in said city consists of what is commonly known and called the Bell instrument, which consists of a receiver and transmitter, used for receiving and transmitting articulate speech;

That the local subscribers of said complainant company have no advantage or preference over one not a regular subscriber of said

complainant company in the matter of the transmission of long-distance messages to or from the office, and particularly in regard to the charges for long-distance messages, and that the charges and bills rendered by the complainant company to its subscribers is limited to the local use of telephone service in said city; while charges and bills rendered for long-distance service are in the name of Pacific States Telephone and Telegraph Company;

That the local poles and wires in said city used by the complainant company for the conducting and carrying on of its local telephone business are much more numerous and extensive than any long-distance telephone poles or wires or telegraph poles or wires running through the city, for the reason that said local
530 poles and wires are of necessity very numerous to reach the many local subscribers in said city, and therefore said local poles and wires run out through the various avenues and streets of said city from said local exchange office and end and terminate in said city of this locality;

That I am familiar with the lines of said complainant company, and estimate the number of said lines radiating from said office for local telephonic service to its various subscribers within said city to be about 3 pairs of wires, or 600 wires so used for said local telephone business, and running from the telephone exchange office of said complainant company over the poles and wires of said complainant company so radiating and running from said telephone exchange out, along and through the various avenues and streets of said city and terminating and ending as aforesaid;

That I am familiar with and know the general nature of the local business done in said city by and between said complainant company and its several subscribers in said city, and that said business is commercially and, from a business point of view, purely and simply and nothing but for telephonic purposes; and that said local exchange subscribers have no telegraphic instruments in the offices or residences for the purpose of transmitting telegraphic messages, either local or long distance.

D. S. PARKER.

531 Subscribed and sworn to before me this 21st day of November, 1905.

[SEAL.]

U. E. WHITE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of D. S. Parker. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 and 3 Union Block, W. 2d St., Pomona, Cal.

In the United States Circuit Court of the Ninth Judicial District, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Affidavit [of Orrin Gallup].

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Orrin Gallup, being first duly sworn, deposes and says:
532 That I am now, and for more than 14 years last past have been, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That I have been engaged in telephone line work and the work of trouble-man for about two and one-half years;

That I was in the employ of the Sunset Telephone and Telegraph Company for about one year;

That when I was in the employ of said Sunset Telephone and Telegraph Company, I was trouble-man and became familiar with all the local poles and wires of said complainant company, doing a local telephone business in said city;

That I was employed by S. C. Slanker, Superintendent of Streets of said city, as line-man, to assist him in designating the local telephone poles and wires of said complainant company, and that I worked as such line-man and was engaged in the cutting of local telephone wires and the designation of local telephone poles of said complainant company and actually worked September 2d, and September 5th, 1905, and continuously up to the time of the service of the injunction papers in this case;

That few poles and wires were taken down on the afternoon of September 1st, 1905, in which I did not participate; but that I examined the poles and wires taken down on the afternoon of said September 1st, 1905, and that from my knowledge, as aforesaid, of the plant and system of said complainant company operating in said city, I do hereby say that at all the times mentioned herein
533 that only the local telephone poles and wires employed and actually used in doing a local telephone business in the City of Pomona were cut or interfered with or disturbed; and that in pursuance of the strict orders of said Street Superintendent, all long-distance telephone poles and wires of whatever kind and all telegraph poles and wires of whatever kind, or owned by whatever company, were not interfered with or removed or cut;

That all of said work done under the orders of said Street Superintendent removed only the wires, poles and apparatus of said com-

plainant company in said city, doing said local and short-distance telephone business in said city, and none other.

ORRIN GALLUP.

Subscribed and sworn to before me this 22d day of November, 1905.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of Orrin Gallup. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3 Union Block, W. 2d St., Pomona, Cal.

534 [*Affidavit of John H. Lee.*]

In the United States Circuit Court of the Ninth Judicial District, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation)) and Others, Respondents.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

John H. Lee, being first duly sworn, deposes and says:

That he is now, and for twenty-two years last past has been, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That he is now, and for three years last past has been, the duly appointed, and elected, qualified and acting judge of the Recorder's Court of the City of Pomona;

That the large map filed herewith, representing five States and one Territory, sized 43″x62″, in the upper right-hand corner being printed, in large one-inch red letters, the words: "Pacific States Telephone & Telegraph Company;" and in the lower left-hand
535 corner of said map, in large black letters, are printed the words: "Lines of Pacific States Telephone and Telegraph Co. at June 1st, 1901," is the map left in my office on, or about the latter part of the year, 1901, or the forepart of the year 1902, and that the same was left and given to me by one G. W. Gates, who was then the manager of the Sunset Telephone and Telegraph Company, at Pomona, California.

JOHN H. LEE.

Subscribed and sworn to before me this 16 day of November, 1905,

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pc ona et al., Respondents. Affidavit of John H. Lee. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 and 3, Union Block, W. 2d St., Pomona, Cal.

536 [*Affidavit of Mell Campbell.*]

In the United States Circuit Court of the Ninth Judicial *Circuit*, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Mell Campbell, being first duly sworn, deposes and says:

That I am now, and have been for fourteen years last past, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That since April, 1903, I have been a member of the Board of Trustees of said City of Pomona; and since April, 1905, I have been President of the Board of Trustees of said City of Pomona;

That I am familiar with the incident in connection with the reference referred to in Record Book No. 3 of said Board of Trustees, at page 311, at a meeting held May 5th, 1903, by said Board of Trustees, in reference to the request and application of Mr. Keyser for permission to extend the lines of complainant Company
537 in said city, pending the action of the courts in the Redlands case; that as far as I know, I have never, nor has the Board of Trustees during the times I have been a member thereof, ever given or assisted in giving any franchises, permissions, or privileges to said complainant Company, to extend and continue the construction of its lines and poles in said city, or any said lines and poles in said City of Pomona;

That I was also a member of said Board of Trustees on February 4th, 1904, at which time said Board of Trustees notified the Street Superintendent of the City of Pomona to notify the Sunset Telephone and Telegraph Company to remove all their wires and poles

on the paved portion of Second Street within a period of sixty days;

That said order was made and passed solely as a matter of police regulation, and for the purpose of protecting the buildings, and part of the thoroughfare which is Pomona's business center, from its numerous poles and wires, which were then an obstruction on said portion of Second Street, and detrimental to the best interests of said portions of Second Street;

That at no time, either at the time of the passage of said order and resolution, or before or after, did I, and as far as I know did any of the members of the Board of Trustees, agree with said complainant Company, or with anyone, that if the said complainant Company would remove its poles, wires and apparatus off the paved portion of Second Street, that the said city, or said Board of Trustees, would grant or give any franchise to so continue its
538 construction and the operation of its telephone system within said City of Pomona, without securing a franchise therefor under the laws of the State of California;

That I have never, and to the best of my knowledge I do not believe that any member of said Board of Trustees has ever, acquiesced or consented or given any rights or franchises of whatever kind or nature, whether expressed or implied, or attempted to give any such rights or franchises to said complainant Company, with the intention to give to said complainant Company any rights or privileges it did not already have, or which would not be regular and proper under the laws of the State of California, or laws of the United States.

MEL CAMPBELL.

Subscribed and sworn to before me this 25th day of November, 1905.

[SEAL.] N. E. WHITE,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Affidavit of Mell Campbell. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3, Union Block, W. 2d St., Pomona, Cal.

539 [*Certificate of Secretary of Interstate Commerce Commission.*]

Interstate Commerce Commission, Washington.
Secretary's Office.

I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that neither the Sunset Telephone and Telegraph Company, a corporation, nor the Pacific States Tele-

phone and Telegraph Company, a corporation, nor the Pacific Telephone and Telegraph Company, a corporation, has filed with the Interstate Commerce Commission any contract or agreement or paper of any kind or description whatsoever, by or for either of said companies, or purporting to affect either of said companies, under the provisions of section 6 of the Telegraph Act, approved August 7, 1888 (Laws 1888, Chap. 772).

In testimony whereof I have hereunto subscribed my name and affixed the seal of the Interstate Commerce Commission, in the City of Washington and District of Columbia, this 7th day of October, A. D. 1905.

[SEAL.]

EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona et al., Respondents. Certificate of Secretary Inter-
540 state Commerce Commission. Filed Dec. 18, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3, Union Block, W. 2d St., Pomona, Cal.

In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE AND TELEGRAPH CO., Complainant,
vs.
CITY OF POMONA et al., Respondents.

Affidavit of Charles L. Evans.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Charles L. Evans, being first duly sworn, deposes and says: That he is of the age of 27 years and that now and more than six months last past has been a resident of the City of Los Angeles, California; that on the 21st day of December, 1905, he went to the offices of the Sunset Telephone and Telegraph Company, a corporation, located on the east side of Hill Street, between 6th and 7th Streets, in said City of Los Angeles, and then and there solicited the prices of local telephone service in said city from an employee of said telephone company, whereupon said employee gave to said affiant for his signature to be signed, before installing said telephone. four
541 copies of a blank contract entitled: "Sunset Telephone and Telegraph Company. Exchange Subscription," a copy of which is hereto attached and made a part hereof.

CHARLES L. EVANS.

Subscribed and sworn to before me this 19th day of January, 1906.

[SEAL.] G. S. WILLIAMS,
Notary Public in and for the County of Los Angeles, State of California.

Sunset Telephone and Telegraph Company—Exchange Subscription.

Terms and Conditions.—The Licensor and Lessor hereunder is the Sunset Telephone and Telegraph Company, a corporation created under the laws of the State of California, and hereinafter designated as the Company. The instruments and lines on the subscriber's premises shall be carefully used, and only as herein stated; all ordinary expense of maintenance and repair shall be borne by the Company; the subscriber shall pay $10 for each telephone or call box destroyed otherwise than by unavoidable accident, and $25 per month in case of unauthorized removal or detention, until its destruction or its loss, without his fault, is satisfactorily proved; but the payment shall not confer any title to the instrument or right to use it. In case communication is interrupted, from any cause whatever, the only liability of the Company shall be to abate the rent during such interruption after twenty-four hours' written notice thereof to the Company. The Company will remove the in-
542 strument from place to place during the term, within the territory covered by the exchange lines upon request and payment of the expense thereof. Upon non-payment of any sum due, or any use of the instruments on said premises improper or contrary hereto, or any removal therefrom, the Company may terminate the subscriber's rights by written notice served on him or any occupant of the premises, and sever his connection and remove the instruments; and for this purpose and for inspection it and its servants may have access thereto.

The right of the subscriber is to use the instruments and connecting wires where the Company may place them, under such rules as the Company may from time to time prescribe, for the purpose of personal communication with the Exchange and with parties whom the Company may connect with him for that purpose, upon his or their business; they are not to be used by any persons other than subscribers of the Company, or for any toll or consideration to be paid by any person other than the subscriber, nor for performing any part of the work of collecting, transmitting or delivering any message in respect of which any toll or consideration has been or is to be paid to any party other than the Company, nor for transmitting market quotations or news for sale, publication or distribution, nor for calling messengers except from the central office, or performing any other service in competition with service which the Company may undertake to perform. Said instruments are the property of the American Bell Telephone Company, are constructed and used under its
543 patents, and are leased and licensed by it, through said Sunset Telephone and Telegraph Co., only for the uses above

stated, in consideration of a royalty and rental which it is to receive therefor, part of the payment named below, and which the Company is authorized to collect for a period not exceeding one year in advance; but any use otherwise or without the payment of said rental or royalty is also an injury to and an invasion of the said rights of the American Bell Telephone Company, entitling it to an injunction and other legal redress in a suit in its name and behalf, and to the remedies, by taking possession of instruments and lines, and collecting rentals from the subscribers, as provided in the contract between the Company and the American Bell Telephone Company, and which the subscriber agrees to permit and to pay.

In view of the liability of errors in transmitting oral messages by telephone, and the impossibility of fairly fixing the cause thereof, the subscriber assumes all the risk of errors from misconnections or mistakes upon and by any telephone line, and the officers and servants thereof, in transmitting, receiving or delivering messages; and in respect of any messages which may be sent or received by or from him over any other telephone or telegraph line, no line shall be responsible for defaults occurring on any other line, nor on its own lines except as specified in its usual contracts, nor for any damages unless the claim therefor be presented in writing within thirty days after sending the message, and he makes the Company, and every other line over which said message may pass, his
544 agent to receive the same, to forward it towards its destination at the rate of unrepeated messages, and for that purpose to bind him by the contracts on the usual blanks and make the message subject to the usual limitations, rules and regulations, to which he hereby agrees. He will reimburse the Company for all tolls it may pay on such messages. For loss or damage that occurs in the course of employment of any messenger it shall not be liable beyond twenty times the charge made for such messenger service.

All the obligations hereof are binding on the subscriber until the instruments shall be re-delivered to the Company or the American Bell Telephone Company, or until, being bound and requested and having an opportunity to remove the same, they shall neglect to do so. All words herein referring to the subscriber shall be taken to be of such number and gender as the character of the subscriber may require.

The subscriber requests the Sunset Telephone and Telegraph Company to place in his premises (Business—Residence) — Street, one set of Standard Telephone Instruments, and connect them (by Metallic Circuit) on a — Party line for his use with the Company's Exchange, Los Angeles, until the first day of ——, 190–, upon the terms and conditions stated above, which he hereby promises to keep and perform, and pay therefor — Dollars, in advance, on the first day of each and every month during said term, commencing as soon as the instruments shall be placed and connected.
545 This rate includes — exchange switches in each month.

And further agrees to pay to said Company — Cents for each exchange switch beyond the allowance. All switches to points out-

side of this Exchange to be paid for at schedule rates. Bills for said service to be paid monthly.

Contracts made for ten-party line service are subject to the further condition that the total number of incoming and outgoing switches shall not exceed an average of ten per day for each month.

It is further agreed that no local continuous conversation shall exceed five minutes.

The subscriber or any other user shall not make use of foul, abusive or profane language or personate any other individual with fradulent intent over the wires connected with his instruments.

This request becomes a binding contract as soon as accepted by the Company, or by furnishing said instruments. Its terms cannot be varied nor waived by any representations or promises of any canvasser or other person, unless the same be in writing, and signed by the General Manager. The subscriber acknowledges that he has received a duplicate hereof.

The Telephone Company reserves the right to alter a subscriber's number when changes are made in the system, in case of the removal of the subscriber, or the temporary relinquishment of the instrument.

Signed at Los Angeles, 190–.

—— ——.

Accepted by the Sunset Telephone and Telegraph Company.
By —— ——.

546 Received copy of within affidavit this 20th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset T. & T. Co., Complainant, vs. City of Pomona et al., Respondents. Affidavit of Charles L. Evans. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents, Rooms 2 & 3, Union Block, W. 2d St., Pomona, Cal.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Affidavit of G. W. Gates.

THE UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

G. W. Gates, being first duly sworn, deposes and says: That
547 he has been a resident of the State of California for more than ten years and is of the age of thirty-one; that I am an electrical engineer; that I have followed light, power and telephone work and that I was engaged in telephone work for the period of about eleven years; that I am acquainted and familiar with all the details of telephonic work in, around and about local telephone exchanges; that I have advanced from lineman through the various steps to manager of a telephone exchange; that I was with said complainant company and the Pacific States Telephone & Telegraph Company, and in their employ for the period of about six years in the counties of Los Angeles and San Bernardino in the State of California, and of which time I was employed and engaged by said complainant company in the County of San Bernardino, and the remaining four and one-half years in the said county of Los Angeles, and of which time I was manager of the telephone exchange of said complainant company and the Pacific States Telephone & Telegraph Company in the said City of Pomona, to wit, that I was engaged and employed by and in the service of said complainant company and said Pacific States Telephone & Telegraph Company from November, 1900, to September, 1902, in said City of Pomona as their manager for the business done in said city.

That on or about the first day of January, 1902, Mr. Hinchcliffe, then the division manager of said complainant company or said Pacific States Telephone & Telegraph Company, asked me by letter
548 how many maps I wanted for distribution in Pomona, which maps gave the line system of the Pacific States Telephone & Telegraph Company and is the same identical map described in the affidavits of John H. Lee and S. N. Curry heretofore made in this case for and on behalf of respondents, and that in accordance with the request of the said division manager Hinchcliffe I notified him and ordered forty-five of said maps of the Pacific States Telephone & Telegraph Company, and said forty-five maps were, in accordance with said request, forwarded to me; that I distributed said maps to many of the prominent citizens of Pomona, among whom are the following: John H. Lee, Curry & Greaser, R. N. Loucks, Allen P. Nichols, Pomona Land & Water Company, Jeff Hathaway,

The Daily Progress, Pomona Daily Review, Pomona Weekly Times, Loud & Gerling, W. H. Patterson, W. A. Bell, W. H. Poston, S. N. Androus, F. W. Balfour, Kerckhoff Cuzner Mills & Lumber Company, and many others, aggregating in all forty or forty-one of said maps distributed in said City of Pomona, and the remainder of said maps were by me left in said telephone exchange office in Pomona.

That on the third day of December, 1905, in company with Robert G. Loucks, city attorney of Pomona, I drove over the system of said companies in Pomona and I found the line system and the poles in said city practically the same as when I lived in said city and was manager of said companies at said place; that there was, on said third day of December, 1905, no change in any of the long or short distance wires of said companies running to or from the exchange office of said companies except a new cable which
549 ran south on Main street for local purposes only, which cable I had been informed was constructed by said companies subsequent to the commencement of this suit and the pole lines and wires shown on said map so distributed by me and which is now on file in this case represents the same and all of the pole lines now or then operated, owned and controlled by said Pacific Telephone & Telegraph Company or said Sunset Telephone & Telegraph Company or either.

That while such manager at Pomona I had charge of all the books and collections at the Pomona telephone exchange and that the Postal Telegraph Company had a telephone in its office and during all the times I was at said exchange in Pomona said Postal Telegraph Company never paid for phone rental, the same as I was ordered to collect from other users and subscribers in said city and it is my best impression that the Postal Telegraph Company never paid for any long distance messages but bills to it each month were taken and delivered but no money was collected by me from said Postal Telegraph Company because and for the reason the collection sheet as used and sent to me monthly by said companies at San Francisco contained no charge against said Telegraph Company.

That there are only four telephone long distance pole lines in Pomona, namely:

1st. A line on First Street from west city limits to the exchange office.

2d. A line from the exchange office on First Street to the
550 east city limits and from there to Uplands and ends.

3d. A line from office south on Gibbs Street to city limits carrying a line to Corona and ends at Corona.

4th. One pole line from office north on Ellen, Gordan and San Bernardino Avenues to Cucamonga Avenue, there connecting with the long distance line running from Los Angeles to San Bernardino.

That all the lines controlled or owned in said city by said companies are many and numerous and all the same, except those above specified used for long distance purposes are exclusively short distance and local telephone pole and wire lines and used exclusively for local telephone business connecting with the said telephone exchange in Pomona and running out therefrom throughout the vari-

ous alleys, streets and avenues in said city and terminating without connecting with any other telephone exchange or telephone office of either of said companies.

That there was no telegraph instrument in the exchange office in Pomona until about two months before I left. Mr. Hinchcliffe said that a telegraph instrument would be installed for the purpose of attending to and handling the company's own business so as to save using time on telephone lines. Said telegraph instrument was never used during my employment by either of said companies in said city for any purpose whatsoever, neither for pay service nor for business of the Sunset or Pacific States Telephone & Telegraph Company; that all of the business done by said companies or
551 either of them in said city was that purely of a telephonic nature and had nothing to do with telegraphy whatsoever; that said companies or either of them were during all said times engaged in transmitting vocal messages or communications transmitted and received purely and only by means of articulate speech; that it is my firm belief from my knowledge of the company and from my conversations with many of its officers and employees that the Pacific States Telephone & Telegraph Company is the long distance telephone company and that the Sunset Telephone & Telegraph Company is the one having charge of the purely local telephone business.

Because of the existence of these two companies and in accordance with my instructions, I kept two separate accounts, one for local service and the other for long distance service, and that I made a daily report on all long distance messages on blanks of the Pacific States Telephone & Telegraph Company and forwarded the same to the Los Angeles office; that I made monthly reports of the long distance telephone business on the blanks of the Pacific States Telephone & Telegraph Company and forwarded the same monthly to the San Francisco office and that a charge for all long distance telephone messages was made upon and charged upon blanks of the Pacific States Telephone & Telegraph Company and by me annexed to the regular monthly telephone rental bill of the Sunset Telephone & Telegraph Company, and presented these two bills together to the local telephone subscriber and collected in accordance therewith for both the said companies the same as evidenced and shown
552 by said receipts in the affidavits of F. H. Osler and Robert G. Loucks heretofore made in this case on behalf of said respondents. While in the employ of said complainant company, and said Pacific States Telephone & Telegraph Company, I often went to the exchanges at San Bernardino and Redlands upon business for said companies and also went to Riverside and I positively know that in neither of these places at the time I was acting for said companies at Pomona did said complainant company or Pacific States Telephone & Telegraph Company or either of them have any telegraph instrument whatsoever in any of said exchange offices.

Never to my knowledge while I was manager at Pomona was there any United States Government or State of California business transacted through my office or to or from my office.

That all the commercial telegraph business done in the City of Pomona and generally throughout the State of California is done almost, if not exclusively, by the Postal Telegraph Company and the Western Union Telegraph Companies, which are purely telegraph companies and are not telephone companies, and that while I was said manager at Pomona, and during all the times I was there, no one ever came to me for the purpose of sending a telegraph message from said city nor was any telegraph message sent to the said office.

G. W. GATES.

553 Subscribed and sworn to before me, this 16th day of December, 1905.

[SEAL.]

ALICE J. STEVENS,
Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within affidavit this 20th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Co., a Corporation, Complainant, vs. City of Pomona, et al., Respondents. Affidavit of G. W. Gates. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respondents. Rooms 2 & 3 Union Block, W. 2d St., Pomona, Cal.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

554 *Third Affidavit of A. N. Harris, City Clerk.*

STATE OF CALIFORNIA,
County of Los Angeles, ss:

A. N. Harris, being first duly sworn, deposes and says:

That he is now, and for more than twenty years last past has been a resident of the City of Pomona, in the County of Los Angeles, State of California;

That he is now, and has been since the 20th day of April, 1903, the duly elected, qualified and acting City Clerk of said City of Pomona;

That the annexed ordinances numbered 109, 275 and 276, are full, true and correct copies of the said ordinances as the same appear upon the original records of said city, and as said ordinances, and each of said ordinances, was duly passed, approved and adopted, and as said ordinances and each of said ordinances now appear on file in the office of the City Clerk of said city.

A. N. HARRIS.

Subscribed and sworn to before me this 18th day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

555 *Ordinance No.* 109 [*Annexed to Third Affidavit of A. N. Harris*].

An Ordinance for Purpose of Police Regulation, Declaring Certain Acts and Things to be Nuisances and Unlawful When Committed or Permitted Within the Corporate Limits of the City of Pomona, and Providing Penalties Therefor.

The Board of Trustees of the City of Pomona do ordain as follows:

SECTION 1. It shall be unlawful for any person to fire any gun or pistol, or to run any horserace, either for a wager or for amusement, or to ride or drive any horse or other animal in a reckless manner, within the following limits in the city of Pomona, viz., between the east line of Gibbs Street and west line of Rebecca Street, the north line of Holt Avenue and south line of Seventh Street.

SEC. 2. It shall be unlawful for any person to molest, interfere, or tamper with any of the fire plugs of the city of Pomona, or to give any false alarm of fire by shouting or otherwise, or by ringing the fire bell of said city.

SEC. 3. It shall be unlawful for any person to deface any building, tree, sidewalk, or curbing within the city of Pomona, by writing, printing, pasting, or posting thereon, any name, word, sign, or advertisement of any description.

SEC. 4. It shall be unlawful for any person to sleep on any of the sidewalks in the city of Pomona, or in any dwelling, barn,
556 outhouse, or other building in said city, without the permission of the owner, agent, or lessee thereof; or for any person to be or appear on any public street, alley, or other public place in said city, in a state of intoxication.

SEC. 5. It shall be unlawful for the owner or keeper of any room or place in the city of Pomona in which billiards, pool, tenpins, or other games are usually played, to play or permit any of such games to be played therein at any time between the hours of 11 o'clock P.

M. on Saturday and 5 o'clock A. M. on the following Monday; or at any time on any other day of the week between the hours of 11 o'clock P. M. and 5 o'clock A. M. of the following day.

SEC. 6. It shall be unlawful for any person, hauling any wood, hay, or grain, in or into the city of Pomona, in any wagon or other vehicle, for barter or sale, to suffer or permit the same to stand or remain for any time on Second Street, between Gibbs and Parcels, while such wood, hay, or grain is being bartered, sold, or offered for sale.

SEC. 7. It shall be unlawful for any person to engage in the playing of ball on any street or in any public place in the city of Pomona, within the limits specified in section 1 of this ordinance.

SEC. 8. It shall be unlawful for any minor child, under the age of eighteen years, to loiter around any railroad depot in the city of Pomona, without the consent of the owner, agent, or person in charge thereof, or to get on or off any railroad car, street-car, engine, hand car, truck or other vehicle, while the same is in motion,
557 or at any time, without the permission of the owner, agent, or person in charge of the same.

SEC. 9. It shall be unlawful for any person, firm, or corporation owning or controlling any street-car, dray, or express wagon, to suffer or permit the same to stand on Second Street, between Garey Avenue and Ellen Street, in front of any business house or place. Provided that this section shall not apply to dray or express wagons while in actual use in receiving or delivering goods.

SEC. 10. It shall be unlawful for any person to kill any bird, except linnets, or to gather or destroy their eggs or nests within the following limits in the city of Pomona: Between the north line of San Bernardino Avenue and the south line of Crow Avenue, the east line of Town Avenue and the west line of Hamilton Avenue.

SEC. 11. It shall be unlawful for any minor child under the age of sixteen years to smoke cigarettes in the city of Pomona.

SEC. 12. It shall be unlawful for any person to place any obstruction of any kind in any public street or on any sidewalk in the city of Pomona, or to authorize, procure, or permit any obstruction to be placed therein or thereon. Each day any such obstruction is maintained or permitted in any such street or on any such sidewalk shall be deemed a separate offense. Provided that this section shall not apply to the temporary obstruction of streets by buildings while the same are being moved from one place to another.

558 SEC. 13. Any of the acts and things in this ordinance prohibited, when committed or permitted in the city of Pomona, shall be deemed, and is hereby declared to be, a public nuisance.

SEC. 14. Any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the city jail of the city of Pomona for a term not exceeding sixty days, or by both such fine and imprisonment. Provided that any judgment that the defendant pay a fine shall also direct that in default of such payment he shall be imprisoned in

the city jail of the city of Pomona until such fine is satisfied in proportion of one day's imprisonment for every two dollars of the fine.

SEC. 15. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

SEC. 16. This ordinance shall take effect and be in force from and after its passage and publication according to law. Provided, that nothing herein contained shall apply to the trial of persons charged with offenses committed prior to the taking effect of this ordinance. In such cases the trial shall be had and the punishment shall be fixed in accordance with the ordinances heretofore existing.

Introduced June 13, 1893.

Approved and adopted June 27, 1893.

J. A. GALLUP,
President of the Board of Trustees.

Attest:
J. R. GARTHSIDE,
City Clerk.

559 *Ordinance No.* 275 [*Annexed to Third Affidavit of A. N. Harris*].

An Ordinance Amending Section 1 of Ordinance No. 49 of the City of Pomona, Relating to Excavating and Digging Up the Streets and Alleys in Said City, and Making a Deposit Therefor.

The board of trustees of the city of Pomona do ordain as follows:

SECTION 1. Section 1 of ordinance No. 49 of the city of Pomona is hereby amended so as to read as follows:

SECTION 1. It shall be unlawful for any person at any time without the consent in writing of the superintendent of streets of the city of Pomona, first had and obtained, to excavate or dig up any portion of any street or alley, in said city for water, gas, sewer or any other purpose whatever. And whenever any person shall excavate or dig up any portion of any such street or alley, under permission, granted or otherwise, no part of such excavation shall be permitted to remain open longer than five days after such excavation was made; but the same shall be filled up, and the streets, sidewalks, alleys, curb, or either, wherein such excavation was made, shall be thoroughly settled with water and packed, and shall be fully and in every respect restored to its former condition by the person making such excavation, provided, that said watering, as herein contemplated, shall not be done in cases where it is not nec-
560 essary, when an order in writing therefor is made by said superintendent of streets; and the same so far as affected by such excavation shall be maintained in good repair for sixty (60) days after such excavation shall have been filled up.

Before consenting to or issuing the permit in this section mentioned said superintendent of streets shall, as security for faithful performance in that all persons making such excavations in the streets and alleys of said city shall restore the same to its former

condition and maintain in good repair as in this section specified, demand of and require from each person to whom said written consent or permission is given a deposit of five ($5) dollars or five dollars certified check for each one hundred (100) feet, or fractional part thereof, of each excavation or digging to be done upon any part or alley in said city under and by virtue of said written consent and permit.

Said security and deposit shall be retained by said superintendent of streets for the period of at least sixty-five (65) days. And if, after said period of sixty (60) days, and upon examination and from information and his own knowledge he finds that all the excavation on such streets and alleys has been properly restored to its former condition and maintained in good repair for said period of sixty days after such excavation as is in this section directed, then he shall return all said deposit and security money and certified checks to the respective depositors. But if said superintendent of streets from such examination, information and knowledge finds
561 that all the excavations on such streets and alleys, or any portion thereof, has not been so properly restored and maintained for said period of sixty days after such excavation as in this section directed, then all said security money or certified check so deposited, or so much thereof as shall be necessary, after careful examination, estimate and order in writing first being had and made therefor by said superintendent of streets, to so replace, restore and maintain any such street or alley, or any portion thereof, in as good condition as it was before such excavation, as aforesaid, but in no case to be less than five ($5) dollars for each such excavation and digging, shall be declared forfeited to said city of Pomona, and shall be deposited by said superintendent of streets with the city treasurer of said city to the credit of the street fund thereof.

Provided that nothing contained in this section shall apply to any work done in or upon any of the said streets or alleys by said city.

SECTION 2. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed; but it is expressly ordered that this ordinance shall not amend, change or modify to any extent ordinance number 131 of said city.

SECTION 3. The city clerk shall certify to the passage of this ordinance and shall cause the same to be published once in
562 The Daily Progress, and thereupon and thereafter it shall take effect and be in force.

Approved this 12th day of December, 1905.

MEL CAMPBELL,
President of the Board of Trustees of the City of Pomona.

Attest:

A. N. HARRIS,
City Clerk of the City of Pomona.
Per T. R. TROTTER,
Deputy City Clerk.

I hereby certify that the foregoing ordinance was introduced on the 5th day of December, 1905, and was passed by the board of

trustees of the city of Pomona, and signed by its president at an adjourned regular meeting of said board, held on the 12th day of December, 1905, by the following vote:

Ayes—Trustees Matthews, Douglass, Miller, Ulery, Campbell.

Noes—Trustees, none.

Absent—Trustees, none.

A. N. HARRIS,
City Clerk of the City of Pomona.
Per T. R. TROTTER,
Deputy City Clerk.

563 *Ordinance No.* 276 [*Annexed to Third Affidavit of A. N. Harris.*]

An Ordinance Making it Unlawful, a Public Nuisance, and Prescribing Penalties to Keep, Place, or Maintain any Pole, Wire, Fixture, or Other Obstruction upon the Streets of the City of Pomona Without Obtaining a Franchise from the Board of Trustees of said City, or after the Expiration of any Franchise, or Without Renewing any Franchise from said Board of Trustees.

The Board of Trustees of the city of Pomona do ordain as follows:

SECTION 1. It shall be unlawful for any person or persons, firm or corporation, their servants, agents or employees to place or cause to be placed or maintain or keep in place, or cause to be maintained or kept in place any pole, wire, fixture or other obstruction upon in, along or across any portion of any street, avenue or alley in the city of Pomona, without having a permit or franchise therefor from the Board of Trustees of said city.

SECTION 2. It shall be unlawful for any person or persons, firm or corporation, their servants, agents or employees to place or cause to be placed, or maintain or keep in place, or cause to be maintained or kept in place any pole, wire, fixture or other obstruc-
564 tion upon, in, along or across any portion of any street, avenue or alley in the city of Pomona after the expiration of any franchise or permit granted by the Board of Trustees of said city, under which any such pole, wire, fixture or other obstruction was heretofore kept, placed or maintained, and which prohibition shall include all such poles, wires, fixtures and other obstructions now kept, placed or maintained after the expiration of any franchise or permit granted by said Board of Trustees of said city and without the renewal of any such permit or franchise from said Board of Trustees of said city.

SECTION 3. Each day any act or thing in this ordinance made unlawful or prohibited is done, maintained, or permitted, shall be deemed, and is hereby declared to be, a separate offense.

Section 4. Any of the acts or things in this ordinance made unlawful or prohibited, when committed or performed in the city of Pomona, shall be deemed, and is hereby declared to be, a public nuisance.

SECTION 5. Any person or persons, firm or corporation, individually or by association with others, either as owner, principal, servant, agent or employee, violating any of the provisions of this ordinance is guilty of a misdemeanor, and upon conviction thereof shall be fined in the sum of not less than twenty-five ($25.00) dollars nor more than three hundred ($300) dollars, or shall be imprisoned in the city jail of the city of Pomona for not more than thirty
565 (30) days, or by both such fine and imprisonment; and every judgment of fine for violation of any provision of this ordinance shall direct that in default of payment of such fine, or any part thereof, the person shall be imprisoned in the city jail of the city of Pomona until the fine is satisfied in the proportion of one day's imprisonment for every two ($2.00) dollars of such fine remaining unpaid.

SECTION 6. The City Clerk shall certify to the passage of this ordinance and shall cause he same to be published once in "The Daily Progress," and thereupon and thereafter it shall take effect and be in force.

Approved this 15th day of January, 1906.

MEL CAMPBELL,
President of the Board of Trustees of the City of Pomona.

Attest:
A. N. HARRIS,
City Clerk of the City of Pomona.
By T. R. TROTTER,
Deputy City Clerk.

I hereby certify that the foregoing ordinance was introduced on the 9th day of January, 1906, and was passed by the Board of Trustees of the city of Pomona, and signed by its president at an adjourned regular meeting of said board, held on the 15th day of January, 1906, by the following vote:

Ayes: Trustees Matthews, Douglass, Miller.
Noes: Trustee Campbell.
Absent: Trustee Ulery.

A. N. HARRIS,
City Clerk of the City of Pomona.
By T. R. TROTTER,
Deputy City Clerk.

566 Received copy of the within affidavit and certified copies this 20th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. Sunset T. & T.

Co., Complt., vs. City of Pomona et al., Respondents. Affidavit of City Clerk, 3d. Filed Jan. 20, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Solicitor for Respdts. Rooms 2 and 3 Union Block, W. 2d St., Pomona, Cal.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Fourth Affidavit of A. N. Harris, City Clerk.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

A. N. Harris, being first duly sworn, deposes and says:

567 That he is still the City Clerk of the City of Pomona, and is the person and City Clerk formerly described in affidavits heretofore made by him in behalf of respondents in this case.

That on January 25th, 1906, he made a careful examination of all the records and minutes of the Board of Trustees of the City of Pomona, from April 1st, 1903, to June 30th, 1904, all inclusive, and especially with reference to matters and proceedings of said Board relative to the matters and things contained in said resolutions of May 5th, 1903, May 12th, 1903, and October 23d, 1903, which resolution of said last meeting will be found on page 395; all of which records, including the additional records this day filed in this affidavit, have been compared by me and certified to as the records in reference to the points therein stated, and from such examination from said April 1st, 1903, to June 30th, 1904, he finds as follows:

That there is no record in reference to the minutes of said Board of May 5th, 1903, or May 12th, 1903, or October 23d, 1903, that any of said resolutions were ever taken under advisement by said Board, nor any of them passed in the form of an ordinance, nor any of them referred or taken under advisement by said Board for a period of five days, or more, or at all; nor that any of said resolutions, or any matters or things therein contained were ever submitted or referred to the City Attorney of said city for any length of

568 time whatsoever.

That there is no record of the renewal of the request of one Keyser, made on said 5th day of May, 1903, or any record of any such request of one Pillsbury, or other person, on May 12th, 1903, or at any other time during said period; that the attached record purporting to be a record of the minutes of the meetings of said Board of Trustees are true and correct copies of the records and

minutes of said Board of Trustees as the same appear in said Record Book and all of which minutes were carefully read and compared by me from the respective minutes of which they are a part and are true and correct.

That during none of said times did he find any agreement or understanding in any form as to any offer or acceptance or proposition from said complainant Company, that if it would move its poles and wires from said paved portion of Second Street, that said city would grant and give to said complainant Company the right and privilege to maintain and operate its system in said city without a special franchise therefor. Neither did we find any such agreement or understanding of said Board of Trustees, or of said Street Superintendent, or any officer of said city, giving or purporting to give any such rights to said complainant Company, nor to remove, nor even any written permission to remove said poles and wires from said paved portion of Second Street, nor for any new or additional construction or extension of the system of complainant Company, or Pacific States Telephone & Telegraph Company, nor did he
569 ever know of any such agreement or understanding, for franchise purposes, whether in or out of said records.

A. N. HARRIS.

Subscribed and sworn to before me, this 30th day of January, 1906.

[SEAL.] J. A. GALLUP.
Notary Public in and for the County of Los Angeles, State of California.

[*Minutes of Board of Trustees of the City of Pomona—Annexed to Fourth Affidavit of A. N. Harris.*]

"Minutes of an Adjourned Regular Meeting of the Board of Trustees of the City of Pomona, Cal., held at 2:30 o'clock, May 12th, 1903," as the Same Appear on Page 322, Record Book No. 3 of the Board of Trustees of the City of Pomona.

"Present, Campbell, Douglas, Lobingier, Miller, Poston.
Absent, None."

"The request of Judge Pillsbury of San Francisco, for the Sunset Telephone Co., asking that the Company be allowed to withdraw the request of the Company's Agent, Mr. Keyser, made at a meeting held May 5th, 1903, with reference to extending lines, was on motion of Campbell, seconded by Douglas, granted."

"Minutes of an adjourned regular meeting of the Board of Trustees of the City of Pomona, held on Friday, October 23d, 1903, at 8 o'clock P. M., for the purpose of hearing the Fleming case,"
570 as the same appear in the minutes of the meeting held on said date, at pages 392, 393 and 395, Record Book No. 3, of the Board of Trustees of the City of Pomona, are as follows:

On said page 392 appears the following:

"Present, Trustees Campbell, Douglas, Miller, Lobingier, Poston and T. R. Trotter, Deputy Clerk.

Absent none."

On said page 393, appears the following:

"On motion, the City Attorney be instructed to draft ordinance for regulating extension of telegraph and telephone poles and lines. Carried."

On said page 395 appears the following:

"On motion and roll-call by the following vote, the Street Superintendent be authorized to grant permits to Sunset Telephone Co. to erect poles when needing extension of lines.

Ayes: Trustee, Campbell, Douglas, Lobingier, Poston.

Noes: Trustee, Miller.

Absent: Trustee, none. Carried."

"Minutes of regular meeting of the Board of Trustees of the City of Pomona held February 7, 1899, 2 P. M.," as the same appear on page 541, of Record Book No. 2, of the Board of Trustees of the City of Pomona:

"Present, The five members of the Board, the City Attorney and the City Clerk."

"Letter from Sunset Telephone and Telegraph Co., regarding charge of $7 made agaisnt A. L. Taylor in moving Fire Hall,
571 was presented by the City Att'y, read, and on motion, received and ordered filed."

Received copy of the within affidavit, this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation, et al., Respondents. Affidavit of A. N. Harris. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 and 3, Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

572 *Affidavit of E. E. Armour.*

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

E. E. Armour, being first duly sworn, deposes and says:

That he is now, and for more than eighteen years last past has been, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That he is of the age of forty-four years, and since the 10th day of October, 1890, he has maintained and conducted a drug store in said city, and does so maintain and conduct said drug store to this date;

That on said 10th day of October, 1890, he was appointed agent for said Sunset Telephone & Telegraph Company for Pomona, and acted as such local Exchange Agent for said Company continuously and until October 8th, 1897;

That he is, and was, at all times herein mentioned familiar with Ordinance No. 30, of the City of Pomona, which is the franchise ordinance granted to and used by said Sunset Telephone & Telegraph Company in said city;

That while he was in its employ he notified the Superintendent of said company that said franchise was about to expire, and he thought it advisable that said company should apply for and secure a new franchise, or a renewal of said franchise, from the Board of Trustees of said city;

573 That said recommendation from said local exchange agent at Pomona was ignored by said Sunset Telephone & Telegraph Company, and no response or consideration was given him in said matter, either at that time or at any other time while he was such agent;

That he was a member of the Board of Trustees of said City of Pomona from January 5th, 1899, to April 17th, 1899, and was a duly appointed, qualified and acting member of said board;

That he is familiar with and knows the substance of the matter contained in the minutes of said Board of Trustees of the 2d day of February, 1899, as found in Record Book No. 2, at page 541, in regard to the claim of said Sunset Company against one Taylor, for the sum of seven dollars, for expense of cutting wires on First Street, in said city, caused by the moving of the Fire Hall of said city, from the north side of First Street, between Main and Gordon Streets, across First Street, to its present location on the southwest corner of Main and First Streets;

That said Taylor was the contracting house-mover who was employed to move said Fire Hall; and in accordance with his contract with the city, he was not to pay for cutting of said wires, made necessary by the removal of said Fire Hall; but that said expense, if any there should be, should be assumed by said city;

That said bill for seven dollars was presented for and on behalf of said Sunset Company by said Taylor, and the matter was
574 taken up by the Board of Trustees of said city, and said Board notified the City Clerk of said city that, inasmuch as Franchise Ordinance No. 30 had expired, said Sunset Company had no franchise, privileges or other legal rights in said city, and that no damage or compensation was due or owing it; and instructed said City Clerk to notify said Sunset Company to that effect;

That said City Clerk notified said Sunset Company to that effect; and in response to said notification, said Sunset Company canceled said bill of seven dollars against said city, said Taylor, or against any other person or corporation.

E. E. ARMOUR.

Subscribed and sworn to before me this 27th day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within affidavit this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation, et al., Respondents. Affi-
davit of E. E. Armour. Filed Jan. 30, 1906. Wm. M. Van
575 Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3 Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Affidavit of N. W. Miller.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

N. W. Miller, being first duly sworn, deposes and says:

That he is now, and ever since the 6th day of February, 1903, has been, a duly appointed and elected, qualified and acting member of the Board of Trustees of the City of Pomona;

That he is now, and has been for twelve years last past, a resident of the City of Pomona, in the County of Los Angeles, State of California;

That since his residence in said City of Pomona, he has taken note of the lines and construction of said Sunset Telephone & Tele-
576 graph Company, or Pacific States Telephone & Telegraph Company, in said city, and most particularly has he given the subject of a franchise for said companies, or either of said companies, special notice, care and attention, and is familiar with and knows all the leading points and incidents in this case, in the effort of said city to compel said companies to obtain a franchise in said city for their, or either of their, local telephone business in sai deity, and to pay a compensation therefor, for the use of the streets of said city, the same as other local telephone or other companies are compelled to pay for the use of said streets;

That there is no desire now, nor at any of the times that he has been a member of said board has there been any desire, upon the part of said city, or its Board of Trustees, or to his knowledge — any of its members or officers, to unnecessarily interfere with, embarrass or injure in any way either of said companies; and at all times he has been such member of said Board of Trustees of said city, that he knows that said Board of Trustees at all times, at the time of the commencement of this action, and now is, and has been, willing and anxious to grant or give to said company, or either of said companies, a chance to purchase or renew its said franchise in said city, which expired in the year 1898, so that said companies, or either of them, would not be trespassers, or unlawfully upon the streets of said city, and so that the poles and wires would not be public nuisances therein;

That ever since he has been a member of said board, the city authorities of Pomona have continually and at all time-
577 legally endeavored to induce and compel said Sunset or said Pacific States Telephone & Telegraph Company to apply for

and secure such franchise for its said local telephonic use in said city; and that all of said times said Sunset *or* said Pacific States Telephone & Telegraph Companies have refused, and do now refuse, to comply with the laws of the State of California and the charter of the City of Pomona, in reference to securing a proper and legal franchise to do such local telephonic business in said city, because and for the reason said companies, or either of them, claim, by and through its attorneys and representatives, that no franchise was necessary or needed from said city, because the interstate laws of the United States gave said complainant company the right to conduct, operate and carry on its said local telephonic business in said city without securing a special franchise from said city for said purposes;

That he was present at the meeting of said Board of Trustees, on the 25th day of February, 1903, when said Board instructed the City Attorney of said city to draft an ordinance for the removal of all electric and telephone wires from Second Street, as the same appears recorded in Record Book No. 3, of the minutes of said Board of Trustees, at page 282;

That a petition was prepared and introduced for said order by said board, which petition was presented by members of the Board of Trade of said city and was signed by various and numerous property owners and business men of said city;

578 That said petition was presented for and said order of said Board of Trustees was made and introduced for the purpose of taking down the unsightly poles and wires that at that time obstructed the business portion of Second Street, merely as a police regulation, and solely for the purpose of removing the poles and wires on the paved portion of Second Street therefrom, the same as said Board of Trustees is now proceeding to remove and take down the old wooden awnings which now obstruct and deface the same business portion of said Second Street;

That neither at the time of the passage of the said order to said City Attorney or at any of the other times mentioned herein was there any agreement or understanding by and between said Board of Trustees with either Sunset or Pacific States Telephone & Telegraph Company, that if said company, or either of them, removed its said poles and wires from said paved portion of Second Street, that said Board of Trustees, acting for said city, would not compel said Sunset or said Pacific States Telephone & Telegraph Companies to secure the proper franchise from said city;

That on said 25th day of February, 1903, nor at any other time that proceedings were being had by said city to remove the poles and wires of said companies from said paved portion of Second Street, and particularly when said petition was being presented by said Board of Trade, said business men and property owners, said

579 members of the said Board of Trade and said business men and said property owners, did not at the time of the presentation, or at any other time, state to said Board of Trustees, and ask as a condition of the removal of said poles and wires from said paved portion of said Second Street, that said Sunset or Pacific States Tele-

phone & Telegraph Companies be relieved from the necessity of securing a franchise for such local telephonic business.

That said members of said Board of Trade, said business men and property owners, at all times herein mentioned, petitioned for the removal of said poles and wires on said paved portion of Second Street, the same as said Board of Trade and business men and property owners of said city, are now petitioning for and are about to secure the removal of the old wooden awnings from said paved portion of said city;

That he was present at the meeting of said board, held May 12th, 1903, and was in attendance at the time Mr. Pillsbury requested of said board that the request of the companies' agent, Mr. Keyser, be withdrawn;

That Mr. Pillsbury appeared in person and made such request, and his request was granted, as the same appears in Record Book No. 3 of said Board of Trustees, at page 322;

That he was also present at the meeting of said board held October 23d, 1903, and he remembers when the resolution—found on page 395, of Record Book No. 3, of said Board of Trustees—
580 purporting to instruct the Street Superintendent of said city to grant permits to said Sunset Company, was acted upon;

That he voted against said purported resolution, because and for the same reasons he expressed to the members of said board, that said proceedings were irregular and illegal and unwarranted and unjustifiable under the law;

That said purported resolution was passed immediately upon its introduction, and at the same meeting of its presentation and introduction, without being laid over for five days, or for any time whatsoever and without being referred or submitted to the City Attorney for his advice and approval;

That said purported resolution was not presented before the said 23d day of October, 1903, nor was it acted upon at any time subsequent to said 23d day of October, 1903;

That said purported resolution was in the form of an ordinary resolution and was not in regular ordinance form, nor was it published as all franchise ordinances of said city are published;

That he was also present at the meeting of said Board of Trustees held February 4th, 1904, when said Board of Trustees passed its final order, directing the Street Superintendent of said city to notify the Sunset Telephone & Telegraph Company to remove all electric wires and poles from the paved portion of Second Street, within a period of sixty days, as the same appears recorded in Record Book No. 3 of said Board of Trustees, at page 447;

581 That said resolution was passed at the same instance and request and in the same manner and for the same purposes, and with the same intent as said previous resolution heretofore referred to, which was passed February 25th, 1903;

That the said resolution of February 4th, 1904, was but a continuation of the same endeavor of said Board of Trustees to remove the poles and wires of said companies from said paved portion of

Second Street, as was manifested theretofore in its resolution of February 25th, 1903;

That no action was taken, and no ordinance was prepared or passed by said Board of Trustees pursuant to its said resolution of removal, of date February 25th, 1903, because and for the reason that it was thought said Companies would voluntarily remove the wires and poles from said portion of Second Street; and for the further reason, that said Board had not agreed or decided upon what limits of said Second Street the said wires and poles should be taken therefrom;

That said complainant Company did not voluntarily, or at all, make any move or endeavor after said 25th day of February, 1903, to remove its said poles and wires, or the poles and wires of said Pacific States Company from Second Street; and that the same matter came up again, and on February 4th, 1904, the said resolution of said Board, referred to herein, was passed as and for the final action for the removal of said poles and wires on said paved portion of Second Street;

582 That he has never, nor as far as he knows, has any member of said Board, or any officer of said city, ever given to said Companies, or either of them, a permit in writing to use and occupy any of the streets of said city, not even during the period that the said city compelled the removal of the poles and wires of said Company from said paved portion of said Second Street, nor at any time since the expiration of said Franchise Ordinance No. 30;

That said city, in the removal of said poles and wires from said paved portion of Second Street, merely ordered the removal of the poles and wires of said Companies from said paved portion of Second Street; and said city did not give said Companies, or either of them, any legal right to replace its said poles and wires upon any of the Avenues, Streets or Alleys of said city; and said city did not—by the passage of said police regulation resolution, give said Companies, or either of them, the right to construct additional and new parts of its said system.

N. W. MILLER.

Subscribed and sworn to before me this 29th day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

583 Received copy of the within affidavit, this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation et al., Respondents. N. W. Miller, Affidavit. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3, Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

584 *Second Affidavit of Orrin Gallup.*

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Orrin Gallup, being first duly sworn, deposes and says:

That he is the same person who made an affidavit on behalf of the City of Pomona, on the 22d day of November, 1905;

That he is still in the telephone business, with the same qualifications contained in said former affidavit, and that all the matters and things therein stated as true then are true now to this day;

That he—as before stated—was formerly in the employ of said Sunset Telephone & Telegraph Company, or said Pacific States Telephone & Telegraph Company, or both, in the said City of Pomona, and became then familiar with, and knew the details of the system of said Companies at Pomona;

That on the 26th day of January, 1906, in company with Robert G. Loucks, he made a visit of one hour at the said joint office of said Companies, and upon examination and observation he found the equipment in the office of said Companies substantially the same as when he was in their said employ;

That from such examination on said day, he found that there were four local positions and four chairs for local telephone operation by articulate speech, each and all of said positions being in actual use for said telephone work, and each of the same having a capacity to provide for about 100 local telephone lines at
585 the present time, or now having a total capacity for about 400 such local telephone lines, which said 400 local telephone lines would usually and ordinarily have the capacity—with slight alteration in switchboard—to provide for about 1200 telephone exchange subscribers, which said 1200 telephone exchange subscribers would need and use about 800 separate wires or about 400 lines; this increase in capacity for such local telephone exchange service could be further increased indefinitely by adding to switchboard and equipment;

That from such examination on said day, he saw and found only

one telegraph instrument in said office; he knows Miss Afferbaugh, and knows that she is now and at the time he was in the employ of said Companies that said Miss Afferbaugh was and is the telegraph operator and bookkeeper in said office, and that most of her time was consumed in bookkeeping; and that the remainder of her time, most of it was consumed in attending to the work of said Companies by forwarding communications from Manager Frank Smith to said Companies, and in delivering to said Smith communications and instructions from the officers of said Companies;

That there is now and was at the time he was in said employ of said Companies, one long distance telephone position and operator, who attends, and attended, exclusively to all long distance telephone messages of articulate speech.

That on the 25th and 26th days of January, 1906, and during the whole of two said days, with horse and buggy, he traveled over the entire system of said Companies at Pomona, connecting
586 with its Pomona telephone exchange;

That he has carefully compiled a statement of the poles and wires of said Companies, from which detailed statement he gives the following as a careful estimate of said wires and poles: 122 miles of local telephone lines, or 244 miles of said telephone wires, used exclusively for the transmission of articulate speech, connecting with the Pomona telephone exchange and terminating and ending in this locality without connecting with any other telephone exchange;

In addition to the wires in the above estimate, there are six local cables running into the said telephone exchange office at Pomona; and that said local cables are constructed and used almost entirely—if not wholly—for local telephone business in said city, and contains about 245 pairs of wires or 850 wires in said cable-, or about 240 miles of wire in said cables;

That there are about 48 miles of telephone poles, or 1680 poles used exclusively for the transmission of articulate speech in connection with the system of the said Sunset and Pacific States Telephone & Telegraph Companies, in the City of Pomona, connecting with the local telephone exchange station in said city, of which about 8 miles thereof, or 280 poles are jointly used in said city for both local and long distance telephone business; while about 40 miles of said telephone poles, or 1400 of said telephone poles are used exclusively for the transmission of articulate speech for local telephonic business in said city, and connected only with the local telephone
587 exchange office of said Companies in said city, and connected with no other telephone office, or other telephone or telegraph office, all of which said pole lines and poles are connected with the local telephone exchange office of said companies, and run directly to said telephone exchange office and run from said telephone exchange office out through the various Streets, Avenues and Alleys of said city, and terminate in said city and locality without connecting with any other telephone or telegraph office.

That under the orders of the Board of Trustees of said city, the Superintendent of Streets took down, south of the Railroads in said city, five lines, or 10 wires of local telephone poles and wires; but

that after the injunction was granted in this case, said Companies constructed a new cable on Main Street, in said city, South to 10th Street, containing about 50 lines, or about 100 wires;

That all telephonic instruments and apparatus in the office of said Companies in Pomona, can be taken down and out, and all telephone poles, lines, wires and apparatus in said city can be taken down and out without interfering with the telegraph business—if any—in said office, and without interfering with any telegraph business done from or to said City of Pomona to or from points outside said city, whether within or without the State of California.

That there are still no telegraph instruments locally used by subscribers of said Companies, in their offices and residences, in said city, connecting with the local Exchange telephone office of said Companies;

588 He repeats: that there was, and has been, under the orders of the Board of Trustees and the Street Superintendent of said city, no telegraph poles or wires taken down, nor did he, or said Street Superintendent, or any of the officers of said city, take down any long distance telephone wires or poles; but that said work was confined wholly and solely to the local telephone poles and wires operating in said city, which poles and wires connected with the local telephone exchange in said city and ran out from said telephone exchange and terminated in the streets of said city without connecting with any other telephone exchange of said Companies, or with any telephone exchange of any other person or Company.

ORRIN GALLUP.

Subscribed and sworn to before me, this 29th day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within affidavit, this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation et al., Respond-
589 ents. Affidavit of Orrin Gallup. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3 Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

Third Affidavit of Street Superintendent S. C. Slanker.

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

S. C. Slanker, being first duly sworn, deposes and says:

That he is the person by the same name who has made and executed former affidavits in this case, for and on behalf of respondents herein;

That he is still the superintendent of said city, and has been during all the times heretofore mentioned in his former affidavits;

That to the best of his knowledge and belief he has never issued to the Sunset Telephone & Telegraph Company or Pacific States
590 Telephone & Telegraph Company, or either of said Companies, their agents or employees, any written permission to use and occupy the streets and alleys of the City of Pomona, in accordance with Section 1, of Ordinance 49, of said city; or in accordance with its amendment, as contained in Section 1 of Ordinance 275 of said city; nor, to the best of his memory, did he ever issue at any time any written permit under said Ordinances, nor at all, to said Companies, to dig up and excavate in the streets and alleys of said city; nor to the best of his knowledge and belief, did he issue to said Companies, or either of them, at any time, any written permit or permission to excavate in any of the alleys and streets of said city, in accordance with a purported resolution of the Board of Trustees of said city at its meeting held on October 23d, 1903, as the same appears in Record Book No. 3 of said Board of Trustees at page 395; nor in accordance with any other order of said Board of Trustees, or any officer of said city, but, on the contrary, he has endeavored—because of advice given him by the City Attorney of Pomona—not in any way to do any act which would jeopardize or waive any rights vested in said city, and has cautiously avoided the signing of any paper to either of said Companies;

That if any additional work or new construction was done in the City of Pomona, it was done without his knowledge and consent, and without any written authority whatsoever from said Street Superintendent, acting for and on behalf of said City of Pomona;

591 That after the issuance of the temporary restraining order in this case, by the Honorable Court, several new lines of poles and wires have been constructed South of Second Street in said city, that were not constructed and operated prior to the issuance of said restraining order; among the new lines put in are to be included one

large cable, and that all this said new construction more than replaces the poles and wires which were taken down in the month of September, 1905, under the orders of the Board of Trustees of said city;

That Robert G. Loucks was, on the 1st day of September, 1905, deputized as his Deputy Street Superintendent; and, as such Deputy, that he assisted in the taking down of only one telephone pole, the same being the first telephone pole taken down under the orders of said Board, and that said Loucks did not assist in the taking down, nor did he take down any other telephone pole than the said one local telephone pole which was situated at the end of the system of said Companies, near the South end of Ellen Street in said city, being also near the Southerly limits of said City of Pomona; that this and all other work thereafter done by said Street Superintendent was done under the direct orders of the Board of Trustees of said city, acting for said City of Pomona.

S. C. SLANKER.

Subscribed and sworn to before me, this 29th day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

592 Received the within affidavit this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation, et al., Respondents. Affidavit of S. C. Slanker. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3 Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

593 *Affidavit of W. H. Poston.*

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

W. H. Poston, being first duly sworn, deposes and says:

That he is now and for more than ten years last past, has been a resident of the City of Pomona, in the County of Los Angeles, State of California;

That from April, 1901, until April, 1905, he was the duly elected, qualified and acting member of the Board of Trustees of the City of Pomona, and during the whole of said time, was President of said Board;

That he has heard read the affidavits filed in this case, for and on behalf of complainant herein; and, as far as they relate to himself, he knows the contents thereof;

That he knows the contents of the affidavit of H. Keyser, in reference to this affiant; and, in reference to the matters and things stated in the affidavit of said Keyser, said affiant says in response thereto, that all the matters and things therein stated are untrue; and that while he was said President of said Board he never made any such promises to said Keyser, or to any other person, as in said affidavit intimated or suggested that the members of said Board of Trustees had decided to recognize the right of the complainant to use the streets of the City of Pomona without obtaining a franchise therefor, because and for the reason said affiant—although holding the office of president of said Board of Trustees—was in reality and
594 legally only one of the said members of said Board of Trustees and could not—if he so desired—have conferred any such rights upon said complainant as is stated in said affidavit;

That said Board did pass a certain resolution of date October 23d, 1903,—as the same appears recorded in Record Book No. 3, of said Board of Trustees, at page 395; that at the time of the passage of said resolution, he clearly understood and knew that said resolution was in no sense to be considered in the nature of a franchise or the granting of a franchise; but was solely for the purpose of furnishing temporary relief to local telephone subscribers, and at the request of said local telephone subscribers for such telephone service; that this was the understanding with the said complainant Company and said members of the Board of Trustees, and it was clearly understood at that time and at all other times that the arrangement was purely a temporary one and was permanent in no sense at all; but

was solely for the purpose of the accommodation of our citizens in the use of said local telephone service, which temporary arrangement was understood to exist only until said Sunset Company had arrived at a definite and final conclusion and decided and determined its right to maintain and operate in the city of Pomona its system without obtaining a special franchise from said city, and as said Company, and its attorneys and representatives, had continually, and at many times asserted that it was endeavoring in good faith to procure and determine; that it was his understanding, and is now, according to the wording of said resolution, that each time said complainant
595 Company decided to construct a party line of ten, that it should first secure a permit from the Street Superintendent of said city, in accordance with the ordinances of said city, that at that time said Company understood as well as said Board of Trustees of said city understood, that said resolution passed by said Board was in no sense a franchise nor a contract nor an endeavor to give a franchise or enter into any contract, whether expressed or implied, because such method of procedure would be irregular and illegal, and contrary to the charter of the city and the laws of the State of California.

That said resolution of October 23d, 1903, was issued only for temporary purposes, as aforesaid, was passed for and because of the representations continually made by counsel for said complainant, that it would bring to trial and determine its rights to so maintain and operate in said city without a franchise; and acting upon said assurance and promises, the Board of Trustees of said city did not wish to unnecessarily become involved in litigation, but would wait until the Redlands case had been determined, as had formerly been promised us by representatives of said Company, including the promise made by Mr. Keyser, for said Company, on the 12th day of May, 1903;

That to the best of his knowledge he is sure that he never signed any paper or document granting, or purporting to grant any permanent franchise or privileges to said Company; that in all endeavors to grant franchises it is the custom, and has been the
596 custom of said Board of Trustees, that franchises shall be passed and granted only in the form of ordinances which are presented in writing, and after being referred to the City Attorney for at least five days, and upon his return thereof, the same are again presented to said Board for its second action, at a meeting held not less than five days from its introduction; and if approved, said ordinances are signed by said President of said Board, and then ordered printed and published in one of our daily papers as one of the ordinances of said city; that no such ordinance or resolution was ever passed by said Board; and if it had been the intention of said Board to grant any permanent franchise or privilege to said Company, said Board of Trustees would have proceeded in the manner outlined;

That he also knows the contents of the affidavit of E. S. Pillsbury, also filed by complainant herein; and in response to the statement therein made by said Pillsbury concerning this affiant, this affiant says and denies the same, as he denies the said Keyser affidavit, that

he made the statement that said Board of Trustees would not require the complainant to obtain a franchise from said city for the purpose of maintaining and operating its system therein; and further denies that said Pillsbury ever made any such statement to said Board of Trustees on or about the 12th day of May, 1903, or at any other time; but the facts in this particular are the same as said affiant stated them in denying the Keyser affidavit, and he denies the statement made; and he also denies the contrary statements made in the
597 affidavit of Frank Smith, or any other person, that there was any such agreement between the said Pillsbury, or any other person, and the said Board of Trustees by which, in consideration of the removal of the poles and wires of said complainant Company from the paved portion of said Second Street, that said Board of Trustees of said city would relieve and release said Company, or any Company from its obligation to secure a proper franchise for maintaining and conducting its said business in said city;

That the resolution passed by said Board, said 25th day of February, 1903, as the same appears recorded in Record Book No. 3 of said Board of Trustees, at page 282; and the resolution passed at the meeting of said Board on February 4th, 1904—as the same appears recorded in Record Book No. 3 of said Board of Trustees, at page 447, were only and purely police regulations of the city, and were for the purpose of removing from the business portion of said city said poles and wires as they materially interfered with the traffic and the need for the full width of the entire portion of said portion of said street; and, as above stated, said poles and wires were not removed from said paved portion of Second Street with any agreement or understanding whatever, that any franchise, rights or privileges would be granted to said complainant Company, or to any person or Company.

W. H. POSTON.

598 Subscribed and sworn to before me, this 30thr day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

Received copy of the within affidavit, this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation, et al., Respondents. Affidavit W. H. Poston. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3 Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

In the United States Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division.

SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
CITY OF POMONA (a Municipal Corporation) and Others, Respondents.

599 *Second Affidavit of City Attorney Loucks.*

UNITED STATES OF AMERICA,
State of California, County of Los Angeles, ss:

Robert G. Loucks, being first duly sworn, deposes and says:

That he is the same person described in and who made an affidavit in behalf of respondents herein on the 31st day of November, 1905;

That he is still City Attorney of said City of Pomona, and one of the defendants herein, the same as alleged in his said former affidavit;

That as said City Attorney, he remembers and knows the facts to be, and therefore states that no ordinance or resolution, or other paper or action, introduced or of date May 5th, 1903, May 12th, 1903, or October 23d, 1903, or at any other time while he was such City Attorney, was ever referred or submitted to said City Attorney for the purpose of giving or granting to either said Sunset Telephone & Telegraph Company, or Pacific States Telephone & Telegraph Company, any franchise, privilege or permit to use or occupy the streets of said city; nor was any such ordinance, resolution or other paper or action for said purpose ever referred or submitted to said City Attorney before, on or after its first, or second, or other reading or action thereon by the Board of Trustees of said city;

That not until about January 18th, 1906, did said City Attorney have any knowledge of the existence of a purported instruction to the Street Superintendent, as found on page 395, of Record Book
600 No. 3 of the Board of Trustees of said city, of said meeting held on October 23d, 1903;

That until January 25th, 1906, said City Attorney did not have any knowledge of the existence of a purported instruction to said City Attorney to draft an ordinance in conformity to the instruction found on page 393, of said Record Book No. 3, which said resolution on said page 393 appears to have been rescinded by subsequent action by the passage, on the same day, of the purported resolution just above referred to on said page 395;

That said City Attorney does not attend all of the meetings of said Board of Trustees, and consequently the City Clerk of said city, according to his rule, notifies said City Attorney in writing of all matters submitted and referred to him;

That neither did said City Clerk nor any officer of said city, nor said Sunset Telephone & Telegraph Company, or Pacific States Telephone & Telegraph Company, nor any of its officers or employees, or any other person, ever, or at any time, bring to his attention the

said record on said page 393, or request of him that said ordinance be drawn and presented to said Board, nor was any such ordinance prepared by any other person ever submitted to said City Attorney for passage by said Board of Trustees;

That he distinctly remembers when the said City Attorney was instructed to draft an ordinance to remove all the wires from Second Street, which resolution was passed at the meeting of said Board of Trustees held February 25th, 1903, as the same appears in
601 Record Book No. 3 of said Board of Trustees at page 282; that said resolution was presented by members of the Board of Trade and signed by property owners and business men in the City of Pomona, and proceedings were begun and had, the same as stated in the affidavit of Trustee N. W. Miller in this case;

That said ordinance was not prepared at that time by said City Attorney, because and for the reason the extent or part of Second Street, which said Board of Trade and said people desired cleared of said poles and wires, was not fixed and certain; and also because it was hoped that after the passage of this resolution said Sunset and Pacific States Companies would voluntarily obey the wish of said Board, so that no other proceedings or steps would be necessary to bring and carry forward this public improvement along and upon the center of the main business street of our city; that because of these reasons all further action was delayed until said Board of Trustees again took the matter up at the request of said petitioners at its meeting held on February 4th, 1904, as the same appears in Record Book No. 3 of said Board of Trustees, at page 447; and at which meeting of February 4th, 1904, said Board passed a resolution instructing the Street Superintendent to notify Sunset Telephone & Telegraph Company to remove all the electric wires and poles on Second Street, between Parcells and Gibbs Streets, within a period of sixty days. Said resolution was passed upon the advice of said City Attorney that an ordinance was not necessary for such purpose, but that a resolution was sufficient to accomplish
602 the desired end; and in accordance with his opinion, said resolution was passed; and a notice to be served by the Street Superintendent of said city was in accordance therewith drawn by said City Attorney, and which notice was dated February 6th, 1904, and signed by S. C. Slanker, said Superintendent of Streets; and the said notice will be found in the first affidavit of A. N. Harris, City Clerk of said city, at page 7;

That he re-affirms all the matters and things stated in his former affidavit, and generally all the matters and things stated in the affidavit of Trustee N. W. Miller, filed in this case; and he believes that said complainant Company has not come into this Court of Equity with clean hands; that when the Redlands telephone case was pending—which telephone case is referred to in the affidavit of Geo. W. Ogle here, and which Redlands case is also referred to in the request of Mr. Keyser, representing the Sunset Company, in the minutes of said Board of Trustees of said meeting held on May 5th, 1903, as the same appears in said Record Book No. 3, at page 311. That said Company and its attorneys and representatives stated to us

that said Companies were in good faith and wanted and desired that the said Redlands case should be determined and settled fully upon its merits; that this assurance and promise on their part undoubtedly stopped the city of Pomona from proceeding against said Companies and their employees at that time; that the reason why said issue did not come to law any sooner was because every time a move was made for or on behalf of said city, that said Sunset and
603 Pacific States employees and their attorneys would swarm and fight to down the sentiment and principal, and it is the fault of said Companies that this case did not come to issue even before May 5th, 1903; and is also their fault that this issue was not settled on or about the 4th day of February, 1902;

That he was a subscriber of said Sunset Company, in Pomona, for several years prior to the 1st day of September, 1905; that as said subscriber, said complainant Company delivered to him, for his use in connection with the use of the telephone receiver and transmitter, two directories, which directories are described as follows:

One directory printed in heavy letters:

"Sunset Telephone & Telegraph Company."

"Los Angeles Telephone Directory."

"March, 1905."

Which said Directory contains 148 pages; was copyrighted 1905 by the Sunset Telephone & Telegraph Company, and which directory is marked "Exhibit F" and filed as a part of this affidavit; that the list of subscribers for Pomona as contained in said Directory, and as contained under the name of Frank Smith, Agent, upon actual count shows the number of subscribers during said March, 1905, to have been 478.

604 One Directory printed in heavy letters:

"Sunset Telephone & Telegraph Company,"

"Los Angeles Telephone Directory."

"This Directory contains the only authorized list of Sunset Telephone & Telegraph Company Subscribers."

"June, 1905."

Which said Directory contains 156 pages, and was copyrighted 1905, by the Sunset Telephone & Telegraph Company, and which Directory is marked "Exhibit G," and filed as a part of this affidavit; that said Directory of June, 1905, issued by said complainant Company, and under the name of Frank Smith, Agent, by actual count shows the number of telephone subscribers in the City of Pomona to be only 404 subscribers; or, a loss of 74 subscribers from March, 1905, to June, 1905, and before the commencement of this action.

That he is familiar with the statements made by affiants in be-

half of said complainant Company in reference to Weather Bureau Reports, and in that behalf, this affiant says: that he has had two interviews with Mr. Franklin, the Weather Bureau Expert and Manager of the Weather Bureau Department in the City of Los Angeles; and when he told Mr. Franklin of the contention of the complainant herein, Mr. Franklin smiled and replied that he, for said Weather Bureau Department, had never done any business with either Sunset Telephone & Telegraph or Pa-
605 cific States Telephone & Telegraph Company, either by telephone or telegraph; that Weather Bureau Reports were free to anybody and everybody who would agree to put them in a conspicuous place; and that there was, to the best of his knowledge, no contract or arrangement by which said Weather Bureau Reports, or any Reports in his office, were to be delivered by any special arrangement with either of said Companies; and that said Companies could receive, as a subscriber for said Weather Bureau Reports, any information that was common, and should be given to any other subscriber for said Weather Bureau Reports, whether it be a person, firm or corporation;

That on the 26th day of January, in company with Orrin Gallup, he went to the joint office of said Companies in Pomona, and requested to be given him a copy of the book containing the regular schedule of rates for conversations by telephone and for messages by telegraph, and said book was refused him, whereupon he proceeded to copy, as much as his time would allow, various parts from said schedule book referred to in the affidavits of G. P. Robinson, and Frank Smith, filed herein on behalf of complainant; that the cover of said book is printed in large letters and entitled, "Pacific States Telephone & Telegraph Company. States of California, Washington, Oregon, Nevada, part of Idaho and principal points in British Columbia."

606 "Conversation and Telegraph Rates."

"Compiled to March 1st, 1903."

On page 5 of said book, appears the following:

"General Rules and Instructions.

"EXECUTIVE OFFICE,
"PORTLAND, OREGON, *March* 1, 1903.

"To Pacific States Telephone & Telegraph Company's Offices:

"This book is for the use and guidance of our employees, and all instructions, rules and rates are to take effect March 1st, 1903.

"It contains a complete list to March 1, 1903, of the Telephone & Telegraph offices of the Pacific States Telephone & Telegraph Company and its connections. Other stations can be reached either by special delivery or by transfer to another Telegraph Company. Additions, changes and corrections will be given in the Tariff Bureau Bulletins issued monthly.

"This book contains two schedules of rates, one designated by numbers and the other by letters. The numbers are for stations directly on the Pacific States Telephone & Telegraph Companie's lines, see page 10. The letters are for stations on Private Lines connecting with the Pacific States Telephone & Telegraph Company, see page 11.

607 Executive Office, Portland, Ore., Mar. 1, 1903,

LOUIS GLASS,

Vice-President and General Manager."

That on page 92 of said book, appears the rates for Los Angeles County, California, showing 53 counties in the State of California. In this regard appears the following:

"Stars After the Names of Counties and Stations.

"One star after the name of a County indicates that some of the offices therein are operated by the Pacific States Telephone & Telegraph Company, and some by other Companies."

"Two stars after the name of a County indicates that all of the offices therein are operated entirely by other Companies."

From said list it appears that Oregon, Nevada, Washington and Idaho, and Del Norte County and Lake County in the State of California have two stars; also that various counties in Oregon, Washington and Idaho, and the Counties of Amador, Butte, Calaveras, Colusa, Glenn, Mendocino, Napa, Nevada, Placer, Sacramento and San Diego in the State of California, have one star:

That the following Counties in the State of California have no star:

Alameda, Contra Costa, Eldorado, Fresno, Humboldt, Kern, Kings, Lassen, Los Angeles, Madera, Marin, Mariposa, Merced, Monterey, Orange, Plumas, Riverside, San Benito, San Bernardino, San Francisco, San Joaquin, San Luis Obispo, San Mateo, Santa

608 Clara, Santa Cruz, Sierra Solano, Sonoma, Stanislaus, Tulare, Ventura, Yolo, Yuba.

And other stars and signatures, indicating the business location of said Pacific States Telephone & Telegraph Company, in the State of California, and elsewhere, which affiant has confused and will not set out, but states that said situation and said stars are essential in showing regulations of the corporation and conduct of its business in the State of California and elsewhere.

That in taking the poles and wires down, beginning with September 1st, 1905, that said affiant was deputized by S. C. Slanker, Street Superintendent of said city, and in that behalf, as Deputy Street Superintendent of said city, he assisted said Street Superintendent in the removal of only one local telephone pole, and no more; that at all other times he merely counseled with and advised said Street Superintendent as to the law and the premises, and that said Street Superintendent was acting under the instructions of said

Board of Trustees of said City of Pomona, in accordance with two resolutions which are set out and made a part of the bill of complaint of said Complainant Company.

ROBERT G. LOUCKS.

Subscribed and sworn to before me, this 29th day of January, 1906.

[SEAL.] J. A. GALLUP,
Notary Public in and for the County of Los Angeles, State of California.

609 Received copy of the within affidavit, this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainant.

[Endorsed:] No. 1209. In the U. S. Circuit Court of the Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone & Telegraph Co., a Corporation, Complainant, vs. City of Pomona, a Municipal Corporation, et al., Respondents. Affidavit Robert G. Loucks. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3, Union Block, West Second Street, Pomona, Cal., Counselor for Respondents.

Articles of Incorporation of The Sunset Telephone-Telegraph Co.

Know All Men by these Presents:

That we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation, under the laws of the State of California.

And We Hereby Certify—

First. That the name of said corporation is Sunset Telephone-Telegraph Company.

Second. That the purposes for which it is formed are, to purchase, construct, lease, or otherwise acquire, and to operate, maintain, lease, sell, or otherwise manage or dispose of, all kinds of tele-
610 graphic or telephonic rights, patents, licenses, franchises, lines, sub-marine or other cables, machinery, apparatus and other property, appertaining to telegraphic or telephonic business; to deal in all kinds of telephonic, telegraphic and electrical materials and supplies and to contract for the construction or maintenance of all kinds of telegraphic, telephonic and electrical systems or apparatus, and to do a general electrical merchandise, contracting and maintenance business. To receive, transmit and deliver telegraphic or telephonic messages for hire or otherwise, and generally to do or perform all kinds of telegraphic or telephonic business, private

or public, and everything pertaining thereto; to do a general district and local telegraph and message business in various cities and towns; to construct, maintain and operate in cities and towns, and elsewhere, telephonic or telegraphic lines connecting the houses and offices of subscribers with its central or branch offices, and to connect such offices, towns or other places, by telephonic or telegraphic wires. To acquire, hold or dispose of shares and interests in the capital stock of other corporations, and to acquire and hold real estate for the purposes of its business, with power to sell, lease or otherwise dispose of the same, as well as any or all other property of the Company. And generally to do and perform all other acts and things which may be necessary or proper to carry on said business in the States of California, Oregon, Nevada, and the Territories of Washington, Utah and Arizona.

611 Third. That the place where its principal business is to be transacted shall be in the City of Oakland, County of Alameda, State of California.

Fourth. That the terms for which it is to exist is fifty years, from and after the date of its incorporation.

Fifth. That the number of its Directors or Trustees shall be five, and that the names and residences of those who are appointed for the first year, are:

Names. Residences:

John I. Sabin, City and County of San Francisco, State of California.

Wm. G. Oliver, City and County of San Francisco, State of California.

L. W. Storror, City and County of San Francisco, State of California.

Andrew White, City and County of San Francisco, State of California.

F. W. Eaton, City and County of San Francisco, State of California.

Sixth. That the amount of the capital stock of this Corporation shall be One Million Dollars, divided in Ten Thousand Shares, of the par value of One Hundred Dollars, each.

Seventh. That the amount of said capital stock which has been actually subscribed is One Hundred Thousand Dollars; and the following are the names of the persons by whom the same has been subscribed, to wit:

612

Names.	No. of shares.	Amount.
Jno. I. Sabin	200	$20,000.
Wm. G. Oliver	200	20,000.
L. W. Storror	200	20,000.
Andrew White	200	20,000.
F. W. Eaton	200	20,000.

And we hereby certify to these additional facts:

The kind of lines intended to be constructed under these Articles is electro-magnetic, and the routes thereof are as follows:

First. From the City of San Francisco via San Mateo, Menlo Park and Santa Clara, to the City of San Jose; thence via Santa Cruz to Watsonville and Monterey, or from San Jose via Gilroy and Watsonville to Monterey.

Second. From the City of San Francisco, by submarine cable, to the City of Oakland.

Third. From the City of Oakland via San Leandro and Haywards to San Jose; via Martinez, Benicia and Suisun to the City of Sacramento; via Davisville and Woodland to Colusa; via Vallejo to Napa and Calistoga.

Fourth. From the City of Sacramento via Marysville to Chico.

Fifth. From the City of Sacramento to Stockton.

Sixth. From the City of San Francisco by submarine cable, across the "Golden Gate," thence to Saucelito, San Rafael, Petaluma and Santa Rosa.

Seventh. From Los Angeles to San Pedro; to Santa Monica; to Tustin via Anaheim; to San Bernardino and Riverside.

613 All of the foregoing routes being in the State of California.

Eighth. From Portland, Oregon, via Salem and Albany to Corvallis, Oregon.

Ninth. In the cities or towns hereinbefore named, and in other cities or towns in said territory and in their vicinity, to run telegraphic wires radiating from the offices of the Corporation to the various houses and buildings occupied by its customers for the purpose of transmitting or receiving telegraphic or telephonic communications or other signals, or for the connection of such wires with each other, or with the wires on main routes as heretofore described.

Tenth. The length of all the telegraphic lines hereinabove described is estimated to be one thousand miles.

In witness whereof, we have hereunto set our hands and seals this twelfth day of Sept., A. D. 1883.

Signed and sealed in the presence of—

AND. WHITE,
JNO. I. SABIN,
WM. G. OLIVER,
F. W. EATON,
L. W. STORROR.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On this twelfth day of September, A. D. One Thousand Eight Hundred and Eighty-three, before me, Holland Smith, a Notary Public, in and for said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared

614 Andred White, Jno. I. Sabin, Wm. G. Oliver, F. W. Eaton and L. W. Storror, known to me to be the persons described

in, and whose names are subscribed to the annexed instrument, and they severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year last above written.

[NOTARIAL SEAL.] HOLLAND SMITH,
Notary Public, No. 307 *Montgomery Street.*

STATE OF CALIFORNIA,
County of Alameda, ss:

I, Truman H. Allen, County Clerk of said County, and Ex-officio Clerk of the Superior Court, in and for said County, hereby certify that I have compared the above and foregoing copy with the original Articles of Incorporation of the Sunset Telephone-Telegraph Company, and that the same is a full, true and correct copy of such original in the above-entitled matter, and the whole thereof as the same now remains of record, and on file in the office of the Clerk of said Superior Court.

Witness my hand with the seal of said Superior Court affixed, at the City of Oakland, this 26th day of September, A. D. 1883.

[SEAL.] TRUMAN H. ALLEN,
County Clerk, etc.,
By W. R. THOMAS,
Deputy Clerk.

615 [Endorsed:] Filed Sept. 26th, 1883. Truman H. Allen, County Clerk. By W. R. Thomas, Deputy Clerk.

[Endorsed:] Filed in the Office of the Secretary of State, the 27th day of Sept., A. D. 1883. Thos. L. Thompson, Secretary of State. By A. E. Shattuck, Deputy. Record Book 43, Page 401.

STATE OF CALIFORNIA,
Department of State:

I, Thos. L. Thompson, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copy of the Articles of Incorporation of the Sunset Telephone-Telegraph Company with the certified copy of the original now on file in my office, and that the same is a correct transcript therefrom and of the whole thereof. Also that this authentication is in due form and by the proper officer.

Witness my hand and the Great Seal of State, at office in Sacramento, California, the 2nd day of April, A. D. 1884.

[GREAT SEAL OF STATE.] THOS. L. THOMPSON,
Secretary of State.
By A. E. SHATTUCK, *Deputy.*

[Endorsed:] No. 367. Filed April 15, 1884. A. W. Potts, Clerk. By B. E. Faney, Deputy.

616 STATE OF CALIFORNIA,
County of Los Angeles, ss:

No. —.

I, C. G. Keyes, County Clerk and Ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original certified copy of Articles of Incorporation of Sunset Telephone-Telegraph Company, as certified to by the Secretary of State, of the State of California, (No. 367) on file in my office and that I have carefully compared the same with the original.

In witness whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 29th day of Jan'y, 1906.

[SEAL.] C. G. KEYES,
County Clerk,
By W. T. McNEELY,
Deputy Clerk.

Received copy of the foregoing certified copy of Articles of Incorporation, this 30th day of January, 1906.

PILLSBURY, MADISON & SUTRO,
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER,
WILLOUGHBY RODMAN,
Solicitors for Complainants.

[Endorsed:] No. 1209. U. S. Circuit Court, 9th Circuit, Southern District of California, Southern Division. Sunset Tel. & Tel. Co., Complt., vs. City of Pomona, et al., Rspdts. Articles of
617 Incorporation of "Sunset" filed in 1883. Filed for Respondents. Filed Jan. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Robert G. Loucks, Rooms 2 & 3 Union Block, W. 2d St., Pomona, Cal., Solicitor for Respondents.

Minutes Board Trustees Aug. 6th, 1887, *Vol.* 1, *page* 295-6.

Upon motion—an ordinance granting franchise to the Sunset Telephone Co., was taken from the table and placed upon its passage as follows:

Ordinance No. 75 [*City of Pasadena*].

An ordinance granting to the Sunset Telephone-Telegraph Company the right to erect poles and run telephone wires along the public streets.

The Board of Trustees of the City of Pasadena do ordain as follows:

Time.

SEC. I. The privilege is hereby granted to the Sunset Telephone-Telegraph Company (a Corporation) for the period of twenty years

from the date of the passage of this ordinance, to erect and maintain telephone poles upon, and to run wires over and along the public highway and thoroughfares of the City of Pasadena, subject to all the provisions of this ordinance.

Location.

SEC. II. Such poles so erected shall be placed fifty yards apart, unless otherwise ordered by the Board of Trustees of said City or its successor; and shall be placed within and adjoining the
618 curb, where streets are sidewalked, when not otherwise directed by said Board of Trustees, and on all other highways or thoroughfares at such points as may be designated by said Board, which Board shall have supervision over the location of all poles and wires erected and placed by said Company, and said Board may remove or cause to be removed, at the expense of said Company, any of the poles or wires of said Company whenever the public convenience shall require the location of the same elsewhere.

Condition.

SEC. III. It is a condition of this franchise, that the City of Pasadena shall have the right to regulate the charges made for telephones, telephone machinery, and telephone service of all kinds in said city; and also to allow similar privileges to any other person or corporation; also that said Company, in doing its work, shall not interfer with any telegraph wires, or water or gas pipes, and that the condition of the streets shall be disturbed as little as possible, and when disturbed shall be restored to as good condition as before such work was done; also, that said city reserves the right at any time to establish a license to be paid for the exercise of the privileges herein granted; and to require all wires to be laid underground, whenever the public convenience may so require.

SEC. IV. The City Clerk shall certify to the passage of this ordinance, and cause the same to be published once in the
619 Pasadena Star, a newspaper published weekly in said city.

Upon call of the Ayes and Nays, this ordinance was passed by the following vote:

Webster, Thomas, Turner and President Parker—Aye.

STATE OF CALIFORNIA,
County of Los Angeles, City of Pasadena, ss:

I, Heman Dyer, Clerk of the City of Pasadena, do hereby certify that the attached copy of Ordinance and Record is a full, true and correct copy of Ordinance No. 75, together with the Record of its Passage of the Board of Trustees of the City of Pasadena, which same was adopted by said Board at its meeting held August 6th, 1887.

In testimony whereof I have hereunto set my hand and affixed the Corporate Seal of the City of Pasadena, this 14th day of October, 1907.

[SEAL.]

HEMAN DYER,
Clerk of the City of Pasadena, Cal.

[Endorsed:] No. 1209. U. S. Circuit Court, 9th Judicial Circuit, Southern Div. Sunset Tel. & Tel. Co., a Corp. Complt., vs. City of Pomona et al., Rspdts. Ordinance No. 75 of City of Pasadena, Rec'd Copy of the within, Oct. 19, 1907. Willoughby Rodman, Solicitor for Complainant. Filed Oct. 19, 1907. Wm. M. Van Dyke, Clerk. Robert G. Loucks, 514 Stimson Bldg., Los Angeles, Cal., Atty. for Rspdts.

620 *Ordinance No.* 430 [*City of Pasadena*].

An ordinance granting permission to the Sunset Telephone and Telegraph Company to construct conduits in certain streets within the City of Pasadena and regulating the construction and use thereof.

Whereas, the Sunset Telephone and Telegraph Company is occupying certain portions of the public streets of the City of Pasadena with poles and wires for conducting electricity under and in accordance with Ordinance No. 75 of the City of Pasadena, which is an ordinance granting to said Company a franchise to erect and maintain telephone and telegraph wires in the streets of the City of Pasadena under certain restrictions and conditions therein contained; and,

Whereas, the Sunset Telephone and Telegraph Company has petitioned the Board of Trustees of the City of Pasadena for permission to construct underground conduits on certain streets in said city, for the purpose of laying therein electric wires, under and by virtue of the franchise referred to above, now therefore the Board of Trustees of the City of Pasadena do ordain as follows:

Section I. That the Sunset Telephone and Telegraph Company be and the same hereby is granted permission under and by virtue of said Ordinance No. 75, to lay and construct an underground conduit for the purpose of placing therein electric wires for
621 telephone and telegraph purposes on and under the following streets in the City of Pasadena, to wit:

Colorado Street from the West line of Delacy Street east to the east line of Marengo Avenue, and Fair Oaks Avenue from the south side of Vineyard Street, north to the south side of Union Street. Said conduit shall be laid at or near the north curb on Colorado Street and at or near the west curb on Fair Oaks Avenue and shall be located and laid down in such position as the City Engineer may designate. Said conduit shall be constructed of wood fiber or paper piping set in concrete and before the commencement of any work under this permit, the said Sunset Telephone and Telegraph Company shall submit to and have approved by the City Engineer, complete plans and specifications thereof. Upon the completion of said work the said Company shall submit to and file with said City Engineer, a map upon such scale as the City Engineer may direct, showing the exact dimensions and locations of the conduit constructed hereunder.

SECTION II. This permit is granted upon express condition that the work shall be commenced thereon not less than sixty days after the approval of the plans by said City Engineer and that said work shall be completed within sixty days after the same shall have been commenced; and upon the condition that within ninety days after said work shall be completed, the Sunset Telephone and Telegraph Company, will remove from the streets or portions of
622 streets covered by this ordinance, excepting intersections, all telegraph, telephone or other wires owned or operated by said Company, except that on each block of the streets affected by this ordinance, the said Company may string and maintain on their poles; such wires as may be necessary to connect with the telephone stations on that particular block, and said wires may be so strung and maintained for such time as the Board of Trustees may direct.

SECTION III. In consideration of the granting of the permission herein provided for, the Sunset Telephone and Telegraph Company agrees to furnish to the City of Pasadena free of all costs and expense to said City, four wires laid in or through said underground conduits, said wires to be used exclusively by the said City for municipal purposes, and the use control and management of said wires is to be free of cost and to be regulated solely by the Board of Trustees of the City of Pasadena or their successors, provided that said four wires shall be used only for telegraph, telephone, fire alarm or signal purposes and not for any purposes requiring a stronger current than is required for telephone or telegraph purposes.

SECTION IV. All the work done under or by virtue of this ordinance is to be performed under the supervision and direction of the Street Superintendent of said City, and to the satisfaction of the Board of Trustees thereof, and in accepting this permit, the said Company agrees that not more than one block of the territory covered by this permit shall be torn up at one time, and that all asphalt, cross-walks or paving of any description, the removal of which may
623 be made necessary by the said work, shall be replaced in as good condition as the same was before the work was commenced, and shall be replaced with the same kind of material with which the streets were paved or covered before the commencement of the work; and that the streets when so finished shall conform to the existing grades, said Company agreeing that all the work done hereunder shall be done in a first class and workmanlike manner.

SECTION V. In laying the conduits herein provided for the said Company agrees that they will not in any way interfere with or affect any existing gas or water pipes or sewers that are now laid in the said streets and that the conduits shall be so placed as not to affect access to said water, gas or other pipes for the purpose of relaying, repair or otherwise.

SECTION VI. Nothing herein contained shall be deemed to alter, amend or affect in any wise whatsoever Ordinance No. 75 of the City of Pasadena referred to above, but the permission hereby granted is to be deemed entirely subordinate to and in conformity with the terms of said ordinance.

SECTION VII. In accepting the permission herein granted the said Company agrees to accept the same in its entirety and to construct all the work herein provided for, it being agreed that acceptance of a part of the above privilege shall be deemed an acceptance of the whole thereof so that if said Company performs any part of the work herein provided for, it shall be deemed
624 to have obligated itself to perform the whole thereof.

SECTION VIII. The City Clerk shall certify to the passage of this Ordinance and cause the same to be published once in the Pasadena Daily News.

Passed and approved this 26th day of June, 1900, by the following vote:

Ayes. Trustees Hoag, Reynolds, Slavin, Twombly and President Dobbins.

Noes. None.

HORACE M. DOBBINS,
President of the Board of Trustees of the City of Pasadena.

I hereby certify that the foregoing ordinance was passed by the Board of Trustees of the City of Pasadena and signed by its President at its meeting on the 26th day of June, 1900.

HEMAN DYER,
Clerk of the City of Pasadena.

STATE OF CALIFORNIA,
County of Los Angeles, City of Pasadena, ss:

I, Heman Dyer, Clerk of the City of Pasadena, do hereby certify that the attached Copy of ordinance is a full, true and correct copy of Ordinance No. 430 of the Board of Trustees, of the City of Pasadena, which same was passed and approved by said Board at its meeting held June 26th 1900, together with the certificate of its passage.

625 In testimony whereof I have hereunto set my hand and affixed the Corporate Seal of the City of Pasadena, this 14th day of October, 1907.

[SEAL.]

HEMAN DYER,
Clerk of the City of Pasadena, Cal.

[Endorsed:] No. 1209. U. S. Circuit Court, 9th Judicial Dist., Southern Div. Sunset Tel. & Tel. Co. a corp., Comp., vs. City of Pomona, et al., Rspdts. Ordinance No. 430 of the City of Pasadena. Rec'd copy of the within, this 19th day of Oct., 1907. Willoughby Rodman, Solicitor for Complainant. Filed Oct. 19, 1907. Wm. M. Van Dyke, Clerk. Robert G. Loucks, 514 Stimson Bldg., Los Angeles, Cal., Atty. for Rspdts.

Ordinance No. 1130 [*City of Los Angeles.*]

(New Series.)

An ordinance of the City of Los Angeles, granting to the Sunset Telephone & Telegraph Company, a corporation organized and doing business under the laws of the State of California, a right to maintain and operate in said City, and in and under the streets, alleys, avenues and thoroughfares thereof, conduits and lines with the wires enclosed therein, and connected therewith for the transmission of intelligence by electricity for a period of twenty-five years.

The Mayor and Council of the City of Los Angeles, do ordain as follows:

SECTION 1. The Sunset Telephone and Telegraph Company, a corporation organized and existing under the laws of the State of California, its successors and assigns is hereby granted
626 the right and privilege to continue and maintain its present telephone system and to erect and maintain, telephone poles upon and to run wires over and upon the public streets and thoroughfares within the limits of said city for a period of twenty-five years, from and after the date of the passage and approval of this ordinance upon the terms and conditions hereinafter provided and not otherwise.

SECTION 2. Said Sunset Telephone and Telegraph Company, shall, within two years from the passage of this ordinance, construct, lay down, maintain and operate in said city, in the streets, alleys, avenues and thoroughfares thereof, from the Plaza south to and including Sixth Street in said city, underground conduits with the necessary manholes and other appliances and the wires and other conductors to be contained therein for the transmission of electricity for telephonic and other purposes for which electricity may be used to transmit intelligence by signals or sounds. Such wires or other conductors may be laid in pipes or conduits or otherwise protected and such other apparatus and appliances may be used *and* may be necessary or proper to maintain or operate the same and the necessary connections to subscribers' stations, and other points may be made from such wires or conductors in localities where the same may be required in such manner as may be best adapted to the location and with such means, apparatus, and appliances as may be necessary or convenient. That not less than ten thousand dollars shall be expended by said company in the construction or laying down of said underground conduits between said
627 Plaza and said Sixth Street within one year from and after the passage and approval of this ordinance and that not less than ten thousand dollars more shall be expended by said company, for said purpose within two years from and after the passage and approval of this ordinance.

SECTION 3. It shall be *un*lawful for the said Sunset Telephone and

Telegraph Company, its successors and assigns, to make all needful and convenient excavations and openings in any of the streets, alleys, avenues and thoroughfares of said city, into which it or they may desire to place such pipes or conduits for the purpose of laying down, maintaining and operating such wires or other conductors for the purposes aforesaid. Provided, that said Company shall submit to the City Council, plans and specifications for the construction of said conduits, which must be approved by the City Council before said work can be commenced. All work hereunder shall be performed upon the public streets, alleys, etc., in excavating or repairing the same in strict compliance with the necessary rules, regulations or ordinances, which have or may be during the continuance of this privilege adopted from time to time, by said City Council or other governing body of said city, and said work shall be done under the direction and to the satisfaction of said City Council or of any officer said City Council may designate, to superintend the same. And where work is done hereunder, the grantee, its successors, shall as soon as practicable restore that portion of the public street, alley or public thoroughfare, disturbed, to
628 the same good order and condition in which it was prior to said work, and the surface shall be securely supported so as not to impair the use or public enjoyment of such street, avenue, alley or other public thoroughfare.

SECTION 4. All of said work of replacing material of the public streets excavated therefrom under the provisions of this office of reconstructing or repairing the roadway, shall be performed by the said grantee, its successors or assigns, within such reasonable time as may be specified by the said City Council or other competent authority, and said grantee, its successors or assigns, shall when so directed by the aforesaid City Council, or other competent authority, from time to time and within such time as may be specified by said authority, make such further and additional repairs to the roadway of such portions of the public streets, etc., so used as may by reason of the work done by said company, its successors or assigns, become depressed or in any other way not conform with the contour of the remaining portion of said streets, etc., provided that prior to the disturbing or taking up of the street or portion of the street, as contemplated by this ordinance, the said grantee, its successors or assigns, shall first file a bond with two sufficient sureties in the sum of ten thousand dollars, to be approved by the Mayor and City Council, and conditioned that each and every street, alley, avenue and thoroughfare or any portion of the same that may be disturbed or torn up by the grantee under the provisions of this ordinance shall be replaced and put in good order under the direction of said City Council and for the performance of
629 each and every condition imposed by this ordinance upon said grantee, its successors and assigns.

SECTION 5. Nothing in this ordinance shall be construed as in anywise to prevent the authorities of said city from sewering, grading, paving, planking, repairing or altering any of the streets in said city, but all such work shall be done if possible so as not to

obstruct, injure or prevent the said use of said wires, conductors, pipes, or other appliances or apparatus of said grantee, its successors or assigns.

SECTION 6. All work under this ordinance by the said grantee, its successors or assigns, shall be done and performed in such a manner as not to interfere with the sewering, piping or other underground work done by the said City or under its authority, nor by individuals, and said company shall be responsible for all damage done to such work or property.

SECTION 7. All the rights and privileges granted by this ordinance to the Sunset Telephone and Telegraph Company, its successors or assigns, are granted upon the following conditions, to wit: That during the entire life of this franchise, said company furnish and maintain for said city, free of charge, the necessary telephones for the public offices, police, fire department and public schools of said city, not exceeding the number of fifty telephones in all, the same to be placed in such offices, places and buildings, as the City Council may from time to time designate, provided that at the option of said city, upon the abandonment of said telephones to said company, said company shall furnish to said city, during the
630 term of this franchise, the use without any expense to said city of one continuous duct through the entire length of all the conduits laid by said company, its successors or assigns, in said city, for the exclusive use of the fire alarm, patrol and police alarm service, and such other uses as may be necessary for said city.

SECTION 8. This franchise is granted upon each and all of the conditions herein named and should said company fail for twenty days to comply with any one of said conditions, after having been notified by the Council, then all rights herein granted shall be forfeited.

SECTION 9. The rights, privileges and franchises herein granted shall continue and be in force for the period of twenty-five years from and after the passage and approval of this ordinance.

SECTION 10. The City Clerk shall certify to the passage of this ordinance and cause it to be published once in the "Los Angeles Daily Times," and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was accepted by the Council of the City of Los Angeles, at its meeting of Nov. 16th, 1891.

[SEAL.] FREEMAN C. TEED,
City Clerk.
By GEO. E. SEIP, *Deputy.*

Approved Nov. 20th, 1891.

HENRY T. HAZARD, *Mayor.*

631 STATE OF CALIFORNIA,
City of Los Angeles, ss:

I, H. J. Lelande, City Clerk of the City of Los Angeles, do hereby certify the foregoing to be a full, true and correct copy of Ordinance No. 1130 (N. S.) of the City of Los Angeles.

In testimony whereof I have hereunto set my hand and affixed the corporate seal of said City, at my offive, this 18 day of Oct. A. D. 1907.

[SEAL.]

H. J. LELANDE,
City Clerk of the City of Los Angeles,
By CHAS. L. WILDE, *Deputy.*

[Endorsed:] No. 1209. U. S. Circuit Court, 9th Judicial Dist., Southern District. Sunset Tel. & Tel. Co., a Corp., Camplt., vs. City of Pomona et al., Respdt. Ordinance No. 1130 N. S. City of Los Angeles Rec'd copy of the within, this 19th day of Oct. 1907. Willoughby Rodman, Solicitor for Complainant. Filed Oct. 19, 1907. Wm. M. Van Dyke, Clerk. Robert G. Loucks, 514 Stimson Bldg., Los Angeles, Cal., Atty. for Rspdts.

632 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity. No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) in the County of Los Angeles, State of California; the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona: S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe, and Charles Foe, Respondents.

Petition for Allowance of Appeal.

Sunset Telephone and Telegraph Company, a corporation, the complainant above named, conceiving itself aggrieved by the order and final decree of the above-entitled court, made and entered by said Court in the above-entitled cause on the 19th day of December, 1908, wherein and whereby it was ordered, adjudged and decreed that the bill of complaint of said complainant in said cause
633 be dismissed, and wherein and whereby the said bill of complaint was dismissed, does hereby appeal from the said order and final decree of December 19th, 1908, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors filed herein and herewith, and petitions of said Court to allow it, said complainant, to prosecute an appeal to said United States Circuit Court of Appeals, under and according to the laws of the United States in that behalf made and provided, and, also, that an order be made fixing the amount of a supercedeas bond, which the complainant shall give and furnish upon said ap-

peal, and that upon the giving of said bond, the temporary injunction heretofore issued herein on or about the 29th day of September, 1906, be continued in full force and effect, pending and until the final determination of said appeal, and that a transcript of the record, papers and proceedings, upon which said order and final decree were made, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

And your petitioner will ever pray, etc.

Dated: San Francisco, December 19th, 1908.

LAWLER, ALLEN, VAN DYKE & JUTTEN,
PILLSBURY, MADISON & SUTRO,
Attorneys for Appellant.

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a Corporation, Complainant, vs. City of Pomona, et
634 al., Respondents. Petition for Allowance of Appeal. Filed Dec. 19, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco.

[*Assignment of Errors.*]

In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity. No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation) in the County of Los Angeles, State of California, the Board of Trustees of the Said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the Said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents.

635 Now comes the Sunset Telephone and Telegraph Company a Corporation, complainant in the above-entitled action, by its attorneys, and specifies the following as errors committeed by the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, upon which it will rely and urge its appeal in said action in the Circuit Court of Appeals for the Ninth Circuit.

I.

That the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, erred in deciding that the complainant has not the right to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the said City of Pomona for its telephone business, without a special franchise therefor from the said City of Pomona.

II.

That the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, erred in deciding that the complainant has not the right to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of said City of Pomona for its telegraph business, without a special franchise therefor from the said City of Pomona.

III.

That the said Court erred in deciding that the complainant has not the right, under the provisions of Section 536 of the Civil Code of the State of California, to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the
636 said City of Pomona for its telephone business, without a special franchise therefor from the said City.

IV.

That the said Court erred in deciding that the complainant has not the right, under the provisions of Section 536 of the Civil Code of the State of California, to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the said City of Pomona for its telegraph business, without a special franchise therefor from the said city.

V.

That the said Court erred in deciding that the Act of the Legislature of the State of California, approved March 23, 1893, entitled "An Act providing for the sale of railroad and other franchises in municipalities, and relative to granting of franchises," repealed section 536 of the Civil Code of California.

VI.

That the said Court erred in deciding that the Act of the Legislature of the State of California, approved March 22, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," repealed section 536 of the Civil Code of California, so far as concerns telegraph and telephone lines doing a local or interstate business.

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VII.

That the said Court erred in deciding that section 536 of the Civil Code does not grant to a telephone company any right to maintain in a street poles and wires used in local or interstate business.

VIII.

That the said Court erred in deciding that the Act of the Legislaturt of the State of California, approved March 22, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," placed a limitation upon section 536 of the Civil Code of California, so that the said section should be applicable only to telephone or telegraph companies doing an interstate business.

IX.

That the said court erred in deciding that section 536 of the Civil Code of California, as originally passed March 21st, 1872, did not include telephone companies.

X.

That the said Court erred in deciding that there is no contract between complainant and the said City of Pomona for the construction, erection, maintenance and operation by the complainant of its lines of poles and wires in the streets and highways of the said City of Pomona for its telephone business, without a special franchise therefor from the said City of Pomona.

638

XI.

That the said Court erred in deciding that there is no contract between complainant and the said City of Pomona for the construction, erection, maintenance and operation by the complainant of its lines of poles and wires in the streets and highways of the said City of Pomona for its telegraph business, without a special franchise therefor from the said City of Pomona.

XII.

That the said Court erred in deciding that the complainant has not the right, without securing a franchise therefor from the said City of Pomona, to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the said City of Pomona for its telephone business, under and by virtue of a contract between the complainant and the said City of Pomona.

XIII.

That the said Court erred in deciding that the complainant has not the right, without securing a franchise therefor from the said City of Pomona, to construct, erect, maintain and operate its lines

of poles and wires in the streets and highways of the said City of Pomona for its telegraph business, under and by virtue of a contract between the complainant and the said City of Pomona.

XIV.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines and poles and wires in the streets and alleys of the City of Pomona for its telephone business, without securing a fran-
639 chise from the city, by reason of a contract in that behalf between the said City of Pomona and the complainant, arising out of the construction, maintenance and operation of its plant by the complainant in said City of Pomona since the year 1898, and more particularly the maintenance and operation and additional construction at a cost of more than $10,000 to the complainant between August 8, 1898, and the year 1903, with the acquiescence and consent and under the direction of the city, and arising out of the changes and reconstruction of the complainant's poles and wires on Second Street, in said city, in 1904, at the request and under the direction of the city, at a cost to the complainant of more than $6700, in consideration of the recognition by the city of the right of the complainant to construct, maintain and operate its system in the city without securing a franchise from the city, and arising out of the extension of the complainant's system under the resolution of the Board of Trustees of the said city, dated October 23rd, 1903, at a cost of about $1500 to the complainant, with the acquiescence and consent and under the direction of the city.

XV.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telegraph business, without securing a franchise from the city, by reason of a contract in that behalf between
640 the said City of Pomona and the complainant, arising out of the construction, maintenance and operation of its plant by the complainant in said City of Pomona since the year 1898, and more particularly the maintenance and operation and additional construction at a cost of more than $10,000 to the complainant between August 8, 1898, and the year 1903, with the acquiescence and consent and under the direction of the city, and arising out of the changes and reconstruction of the complainant's poles and wires on Second Street, in said City, in 1904, at the request and under the direction of the city at a cost to the complainant of more than $6,700, in consideration of the recognition by the city of the right of the complainant to construct, maintain and operate its system in the city without securing a franchise from the city, and arising out of the extension of the complainant's system under the resolution of the Board of Trustees of the said city, dated October 23rd, 1903, at a cost of about $1500 to the complainant with the acquiescence and consent and under the direction of the city.

XVI.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telephone business, without securing a franchise from the city, by reason of a contract in that behalf between the said City of Pomona and the complainant, arising out of the construction, maintenance and operation of its plant by the complainant in said City of Pomona since the year 1898, and more
641 particularly the maintenance and operation and additional construction of and to its system at a cost of more than $10,000 to the complainant between August 8, 1898, and the year 1903, with the acquiescence and consent and under the direction of the city.

XVII.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telegraph business, without securing a franchise from the city, by reason of a contract in that behalf between the said City of Pomona and the complainant, arising out of the construction, maintenance and operation of its plant by the complainant in said City of Pomona since the year 1898, and more particularly the maintenance and operation and additional construction of and to its system at a cost of more than $10,000 to the complainant between August 8, 1898, and the year 1903, with the acquiescence and consent and under the direction of the city.

XVIII.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telephone business, without securing a franchise from the city, by reason of a contract in that behalf between the said City of Pomona and the complainant, arising out of the changes and reconstruction of the complainant's poles and
642 wires on Second Street, in said city, in 1904, at the request and under the direction of the city, at a cost to the complainant of more than $6700, in consideration of the recognition by the city of the right of the complainant to construct, maintain and operate its system in the city without securing a franchise from the city.

XIX.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telegraph business, without securing a franchise from the city by reason of a contract in that behalf between

the said City of Pomona and the complainant, arising out of the changes and reconstruction of the complainant's poles and wires on Second Street, in said city, in 1904, at the request and under the direction of the city, at a cost to the complainant of more than $6,700, in consideration of the recognition by the city of the right of the complainant to construct, maintain and operate its system in the city without securing a franchise from the city.

XX.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telephone business, without securing a franchise from the city, by reason of a contract in that behalf between
643 the said City of Pomona and the complainant, arising out of the extension of the complainant's system under the resolution of the Board of Trustees of the said city, dated October 23d, 1903, at a cost of about $1500 to the complainant, with the acquiescence and consent and under the direction of the city.

XXI.

That the said Court erred in deciding that the complainant has not the right to continue the construction, maintenance and operation of its lines of poles and wires in the streets and alleys of the City of Pomona for its telegraph business, without securing a franchise from the city, by reason of a contract in that behalf between the said City of Pomona and the complainant, arising out of the extension of the complainant's system under the resolution of the Board of Trustees of the said city, dated October 23d, 1903, at a cost of about $1500 to the complainant, with the acquiescence and consent and under the direction of the city.

XXII.

That the said Court erred in deciding that the said City of Pomona has not consented to the occupancy of its streets by the lines of complainant.

XXIII.

That the said Court erred in deciding that the resolution of October 23, 1903, authorizing the Street Superintendent to grant permits to complainant for extensions of its lines, was but a temporary provision to save complainant's business from injury during the period which the Board of Trustees supposed would elapse before
644 there could be had a judicial settlement of the controversy between the complainant and the city as to complainant's right to maintain its lines in the streets of said city.

XXIV.

That the said Court erred in deciding that the City of Pomona, since the expiration of the franchise granted by Ordinance No. 30,

has persistently sought to have complainant procure a new franchise and never agreed or consented otherwise to occupancy of its streets by any of complainant's lines.

XXV.

That the said Court erred in deciding that the construction, maintenance and operation of its lines by the complainant since the year 1889 in the streets and highways of the City of Pomona, were not an acceptance by the complainant of the terms of section 536 of the Civil Code of California, and that a contract was not thereby created between the State of California and the complainant for the maintenance and operation by the complainant of its lines of poles and wires in the streets and highways of the said City of Pomona for its telephone business, without a special franchise therefor from said City.

XXVI.

That the said Court erred in deciding that the construction, maintenance and operation of its lines by the complainant since the year 1889 in the streets and highways of the City of Pomona, were not an acceptance by the complainant of the terms of section 536 of the Civil Code of California, and that a contract was not thereby
645 created between the State of California and the complainant for the maintenance and operation by the complainant of its lines of poles and wires in the streets and highways of the said City of Pomona for its telegraph business, without a special franchise therefor from said city.

XXVII.

That the said Court erred in deciding that, under the provisions of section 1 of the Act of the Legislature of the State of California, approved March 22d, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," the complainant is not relieved from the necessity of obtaining a franchise from the said City of Pomona for the right to construct, erect, maintain and operate its lines of poles and wires for its telephone business in the streets and highways of the said City of Pomona.

XXVIII.

That the said Court erred in deciding that, under the provisions of section 1, of the Act of the Legislature of the State of California, approved March 22d, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," the complainant is not relieved from the necessity of obtaining a franchise from the said City of Pomona for the right to
646 construct, erect, maintain and operate its lines of poles and wires for its telegraph business in the streets and highways of the said City of Pomona.

XXIX.

That the said Court erred in deciding that the complainant does not do an interstate telephone business from and to all points in the said City of Pomona, reached by its telephone system, to and from points and places in the States of California, Oregon, Washington and Nevada.

XXX.

That the said Court erred in deciding that the complainant does not do an interstate telegraph business from and to the said City of Pomona to and from points and places in the States of California, Oregon, Washington and Nevada.

XXXI.

That the said Court erred in deciding that the complainant has not the right, under the provisions of the Act of Congress of the United States, approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," to construct, maintain and operate over and along the streets and highways of the City of Pomona its lines of telegraph, without a special franchise therefor from the said City of Pomona.

XXXII.

That the said Court erred in deciding that the complainant has not the right under the provisions of the Act of the Congress
647 of the United States, approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," to construct, maintain and operate over and along the streets and highways of the City of Pomona, without a special franchise from the said city, its lines of poles and wires for its telephone business used in connection with and as an integral part of its general telegraph system throughout the States of California, Oregon, Washington and Nevada.

XXXIII.

That the said Court erred in deciding that the Act of the Congress of the United States, approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," does not confer upon telegraph companies the right to occupy with their poles, wires and other fixtures, the streets of a city, without the consent of the city.

XXXIV.

That the said Court erred in deciding that the lines of poles and wires of the complainant in the said City of Pomona are not an integral part of the general telephone system of the complainant in the States of California, Oregon, Washington and Nevada, whereby

telephone messages are transmitted from and to points (including all points reached by the telephone system of the complainant in the said City of Pomona, to and from points in each of said
648 States.

XXXV.

That the said Court erred in deciding that the lines of poles and wires of the complainant in the said City of Pomona are not an integral part of the general telegraph system of the complainant in the States of California, Oregon, Washington and Nevada, whereby telegraph messages are transmitted from and to points (including all points reached by the telephone system of the complainant in the said City of Pomona) to and from points in each of said States.

XXXVI.

That the said Court erred in deciding that the said City of Pomona is threatening to interfere with lines of the complainant used only for its local or interstate telephone business.

XXXVII.

That the said Court erred in deciding that the complainant, which does an interstate telephone business to and from the City of Pomona from and to points in the States of California, Oregon, Washington and Nevada, is not entitled to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the City of Pomona, without a special franchise therefor from the said city.

XXXVIII.

That the said Court erred in deciding that the complainant is not engaged in and does not do a telegraph business in the said City of Pomona.

649 XXXIX.

That the said Court erred in deciding that the complainant is not entitled to relief because the respondents are acting unlawfully and without any proper authority.

XL.

That the said Court erred in deciding that the complainant is not entitled to relief prayed for in its bill of complaint, because the respondents in attempting to destroy the system of the complainant are acting unlawfully and without authority, inasmuch as the resolution of August 1, 1905, does not affect the complainant, but is directed to "Sunset Telephone-Telegraph Company."

XLI.

That the said Court erred in deciding that the complainant is not entitled to relief prayed for in its bill of complaint, because the

respondents in attempting to destroy the system of the complainant are acting unlawfully and without authority, inasmuch as the resolution of August 1, 1905, provides that complainant must obtain a franchise within thirty (30) days, and that complainant, under the terms of the Broughton Act, to wit: the Act of the Legislature of the State of California, approved March 22d, 1905, and entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," under which the said City of Pomona claimed that complainant must secure a franchise, could not
650 obtain a franchise within thirty days.

XLII.

That the said Court erred in deciding that the complainant is not entitled to relief prayed for in its bill of complaint, because the respondents in attempting to destroy the system of the complainant are acting unlawfully and without authority, inasmuch as franchises, under the terms of the Act of the Legislature of the State of California, approved March 22d, 1905, and entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," are sold to the highest bidder, and the complainant might not obtain the franchise thus offered for sale.

XLIII.

That the said Court erred in deciding that the complainant is not entitled to relief prayed for in its bill of complaint, because the respondents in attempting to destroy the system of the complainant are acting unlawfully and without authority, inasmuch as the poles and wires of complainant were declared a nuisance by the said resotion of August 1, 1905, and the said city and its officers were proceeding to destroy the system of the complainant by authority of said resolution, and said resolution is ineffectual for the purpose for which it was passed, because a nuisance cannot be declared by resolution, but must be declared by ordinance.

651 XLIV.

That the said Court erred in deciding that the complainant is unlawfully maintaining its interstate and local lines in the streets of the City of Pomona without right.

XLV.

That the said Court erred in ordering the bill of complaint to be dismissed.

XLVI.

That the said Court erred in entering its final order and decree herein of December 19th, 1908, dismissing the bill of complaint of complainant.

And for said errors complainant prays that the said decree rendered herein on the 19th day of December, 1908, be reversed, with instructions to the said Circuit Court to make perpetual the temporary injunction heretofore issued herein against the respondents on the 29th day of September, 1906.

LAWLER, ALLEN, VAN DYKE & JUTTEN,
PILLSBURY, MADISON & SUTRO,
Attorneys for Sunset Telephone and Telegraph Company, Complainant.

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a Corporation, Complainant, vs. City of Pomona et al., Respondents. Assignment of Errors. Filed Dec. 19, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco.

652 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity. No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,
vs.
THE CITY OF POMONA (a Municipal Corporation), in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe, and Charles Foe, Respondents.

Order Allowing Appeal and Suspending Decree as to Injunction.

Upon motion of the attorneys for the complainant in the above-entitled action and upon the filing of a petition for appeal and assignment of errors herein, it is ordered that an appeal be, and the same is hereby allowed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the order and final decree entered herein on the 19th day of December, 1908, wherein and
653 whereby the bill of complaint herein is dismissed, and that the amount of the supersedeas bond, to be given by the complainant and appellant upon said appeal be, and the same is hereby fixed at the sum of five thousand dollars.

Dated: Los Angeles, California, December 19th, 1908.

OLIN WELLBORN,
Judge.

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a corporation, Complainant, vs. City of Pomona et al., Respondents. Order Allowing Appeal and Suspending Decree as to Injunction. Filed Dec. 19, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco.

654 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity. No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents.

Supersedeas Bond.

Know all men by these presents: That we, Sunset Telephone and Telegraph Company, a corporation, as principal, and Fidelity and Deposit Co. of Maryland, a corporation, as surety, are held and firmly bound unto the respondents in the above-entitled action in the sum of five thousand dollars, for which payment, well and
655 truly to be made, we bind ourselves and each of us jointly and severally, and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 17th day of December, one thousand nine hundred and eight.

Whereas, lately at a session of the United States Circuit Court, for the Ninth Circuit, Southern District of California, Southern Division, in a suit pending in said Court between the said Sunset Telephone and Telegraph Company, a corporation, complainant, and the City of Pomona, a municipal corporation in the County of Los Angeles, State of California, the board of trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe, and Charles Foe, respondents, a decree was

rendered, dismissing the bill of complaint in said action, and the complainant having obtained from said Circuit Court an order allowing an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the aforesaid decree, and a citation, directed to the said respondents, is to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at San Francisco, California; and

656 Whereas, the said Circuit Court has made an order that the temporary injunction, theretofore issued by it in said action, be restored and continued in force until the said appeal in said action is heard and determined.

Now, therefore, the condition of this obligation is such that, if the said Sunset Telephone and Telegraph Company, a corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, and shall also answer all damages that the respondents may suffer by reason of the restoration and continuance in force, pending the said appeal, of the said temporary injunction, if it shall fail to make its plea good, then this obligation is to be void; otherwise to remain in full force and effect.

[SEAL.] SUNSET TELEPHONE AND TELEGRAPH COMPANY,
By E. J. ZIMMER, *Vice-president.*
By F. W. EATON, *Secretary.*
FIDELITY & DEPOSIT CO. OF MD.
By CARROLL ALLEN, *Atty in Fact.*
[SEAL.] FIDELITY & DEPOSIT CO. OF MD.
By A. P. CHIPRON, *Agent.*

657 STATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 17th day of December, 1908, before me, Margaret Darrow, a notary public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared Carroll Allen, known to me to be the Attorney in Fact, and A. P. Chipron, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the corporation that executed the within instrument, and acknowledged to me that said corporation executed the same; that the signatures to said instrument of said Attorney in Fact and Agent, respectively, are the genuine signatures, respectively, of said Carroll Allen, its Attorney in Fact, and said A. P. Chipron, its Agent.

[SEAL.] MARGARET DARROW,
Notary Public in and for the County of Los Angeles, State of California.

The foregoing bond is hereby approved this 19 day of December, 1908.

OLIN WELLBORN,
United States District Judge.

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a Corporation, Complainant, vs. City of Pomona et al., Respondents. Supersedeas Bond. Filed Dec. 19, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco.

658 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity. No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents.

Order [Restoring Temporary Injunction].

Whereas, heretofore and on or about the 29th day of September, 1906, a temporary injunction was issued in the above-entitled action, pursuant to the prayer of the bill of complaint therein, restraining the respondents from doing, or causing or permitting to be done, certain acts or things as in said temporary injunction more
659 fully appears (reference thereto being hereby made for further particulars); and

Whereas, this Court has, by its decree this day made and entered, dissolved said injunction and dismissed said bill of complaint; and

Whereas, said complainant has signified its intention to forthwith prosecute an appeal from said decree, which appeal is allowed concurrently with this order; and

Whereas, the Court is of opinion that the status quo should be maintained pending such appeal;

Now, therefore, it is hereby ordered that the temporary injunction, heretofore issued in the above-entitled action, be and is hereby restored, with the modification, however, that it continue in force only until the appeal herein is heard and determined.

OLIN WELLBORN, *Judge.*

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a

Corporation, Complainant, vs. City of Pomona et al., Respondents. Order. Filed Dec. 19, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohn Building, San Francisco.

660 In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division.

In Equity. No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

CITY OF POMONA et al., Respondents.

Order [Transmitting Original Exhibits].

Good cause appearing therefor, it is hereby ordered on the application of complainant and appellant that the original map, filed herein on behalf of the respondents on the 18th day of December, 1905, also the original Exhibit "F," being a Los Angeles Telephone Directory, also the original Exhibit "G," being a Los Angeles Telephone Directory, both of said directories filed on behalf of the respondents herein, and also two certified copies of orders of the Postmaster-General of the United States numbered respectively 15 and 876, filed as exhibits herein, be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, for use upon the appeal of the appellant herein; and it is hereby ordered that the Clerk of this Court do not make a copy of said map or either of said directories or of said two orders of the Postmaster-General for the record on said appeal, it being hereby ordered by said Court that the original map and the originals
661 of said directories are to be used as a part of the record upon said appeal in lieu of the copies thereof.

Dated Los Angeles, December 22, 1908.

OLIN WELLBORN,
United States District Judge.

[Endorsed:] No. 1209. In Equity. In the Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California, Southern Division. Sunset Telephone and Telegraph Company, a Corporation, Complainant, vs. City of Pomona et al., Respondents. Order. Filed Dec. 22, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco.

662 [*Clerk's Certificate to Transcript of Record.*]

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for Southern District of California, Southern Division.

No. 1209.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Complainant,

vs.

THE CITY OF POMONA (a Municipal Corporation) in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing six hundred and seven (607) typewritten pages, numbered from 1 to 607, inclusive, and comprised in one volume, to be a full, true
663 and correct copy of the record, pleadings and of all proceedings and papers upon which the final decree entered on the 19th day of December, 1908, was made (excepting therefrom original Exhibits "F" and "G" to the second affidavit of City Attorney Loucks; Exhibit "F" being Los Angeles Telephone Directory, March, 1905, and Exhibit "G" being Los Angeles Telephone Directory June, 1905; and a map showing Pacific States Telephone and Telegraph system, also excepting copies of Orders of the Postmaster-General of the United States, numbered respectively 15 and 876, filed as exhibits herein, which said original exhibits are, by order of Court, transmitted herewith and made a part hereof), and also of the Conclusions of the Court on application for temporary injunction, Opinion of the Court on Final Hearing, Assignment of Errors, Petition for and Order Allowing Appeal and Bond on Appeal, and that the same together constitute the Transcript of the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit in said cause.

I do further certify that the cost of the foregoing record is $472.15, the amount whereof has been paid me by the Sunset Telephone and Telegraph Company, a Corporation, the appellant in said cause.

In testimony whereof, I have hereunto affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of Californa, Southern Di-

vision, this 28th day of December, in the year of our Lord
664 one thousand nine hundred and eight, and of our Independence the one hundred and thirty-third.

[SEAL.] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed:] No. 1678. United States Circuit Court of Appeals for the Ninth Circuit. The Sunset Telephone and Telegraph Company (a Corporation), Appellant, vs. The City of Pomona (a Municipal Corporation), in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. A. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

Filed December 30, 1908.

F. D. MONCKTON, *Clerk.*

665 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

THE CITY OF POMONA (a Municipal Corporation), in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing six hundred and sixty-four (664) pages, numbered from and including one (1) to and including six hundred and sixty-four (664), and comprised in the preceding two (2) volumes, marked, re-

spectively, Vol. I., and Vol. II, to be a true copy of the
666 printed Transcript of Record upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division, in the above-entitled case as the original and copies of the said Printed Transcript of Record were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, this seventh day of January, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

667 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Appellant,

vs.

THE CITY OF POMONA, (a Municipal Corporation), in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Appellees.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

(Addenda.)

668 At a stated term, to wit: the October term A. D. 1908 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Thursday the fourth day of February in the year of our Lord one thousand, nine hundred and nine.

Present: The Honorable William B. Gilbert, Circuit Judge.
Honorable Erskine M. Ross, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,
vs.
THE CITY OF POMONA, a Municipal Corporation, et al., Appellees.

Order of Submission.

Upon motion of Mr. Beverly L. Hodghead, it is ordered that Mr. Hodghead be, and hereby is granted leave to file a brief in the above-entitled cause as amicus curiæ.

Upon motion of Mr. J. P. Wood, it is ordered that Mr. Wood be, and hereby is granted leave to file a brief in the above-entitled cause as amicus curiæ, within ten (10) days from date.

669 Thereupon, the appeal in the above-entitled cause was argued by Mr. Alfred Sutro, counsel for the appellant, and Mr. Robert G. Loucks, counsel for the appellees, and submitted to the Court for consideration and decision, with leave to the counsel for the appellees to file a reply-brief within twenty (20) days from date, and with leave to counsel for the appellant to file a reply-brief to the briefs of Messrs. Hodghead and Wood, and to the reply-brief of counsel for the appellees, within forty (40) days from date.

670 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,
vs.
THE CITY OF POMONA (a Municipal Corporation) et al., Appellees.

Opinion U. S. Circuit Court of Appeals.

Upon Appeal from the United States Circuit Court for the Southern District of California, Southern Division.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Ross, Circuit Judge, delivered the opinion of the court:

The question presented on this appeal is whether the appellant, a California corporation, has the right to maintain its telephone poles and wires in the streets of Pomona, which is a city within the state, of the fifth class, without obtaining from the city a Franchise therefor. No question is presented by the record respecting the right of the city to make a charge against the company for the use of those portions of the streets actually occupied by it.

A controversy between the company and the city and its officers over the question stated having arisen, and the city authorities having commenced to cut down the poles of the company, the suit was commenced by it to secure injunctive relief, resulting, on the
671 final hearing, in a decree dismissing -he appellant's bill of complaint, from which decree the present appeal comes.

While, in the court below, the complainant's alleged rights were in part based upon the act of Congress of July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes" (14 Stats. 221), which act entered into the consideration of the court below and is much discussed on the present appeal by counsel for the appellees, no right growing out of that act is here asserted on the part of the appellant, and hence we omit all reference to it.

The appellant here bases its alleged rights upon certain provisions of the statutes of the state of California, and upon a claimed contract between it and the city, arising out of: 1, The construction, maintenance and operation of its plant in Pomona since August 8, 1898, and, more particularly, the maintenance, operation and additional construction of its telephone system between the years 1898 and 1902 by and with the acquiescence and consent and under the direction of the city, at a cost of more than $10,000.00; 2. The change and removal, in the year 1904, by the appellant, of its poles and wires from Second Street, at the request of the city, and their reconstruction on others of its streets with its approval and under its direction, at a cost to the appellant of more than $6,716.48; 3. The extension of the appellant's telephone system by the alleged permission of the city under a resolution thereof of date October 23, 1903, at a cost of about $1500.00, and 4, the assessment and taxation by the city to the appellant of a franchise for several years preceding the commencement of this suit, including the years 1904-5, and 1905-6, and the acceptance and use by the city of two free
672 telephones from the appellant for more than three years prior to and after the commencement of the suit.

The appellant was incorporated in April, 1889, for the purpose of doing a general telephone and telegraph business in the states of California, Oregon, and Nevada, and the then territories of Washington, Utah and Arizona, and elsewhere. Prior to its incorporation, to-wit, on the 8th day of August, 1888, the city of Pomona passed an ordinance, numbered 30, granting to another and distinct corporation, called The Sunset Telephone-Telegraph Company, a franchise to erect telephone poles and wires along the public streets of the city, for a period of ten years, and, in the month of May of the following year, that company transferred to the appellant all of its property, including whatever rights it acquired under that ordinance. Since the month of May, 1899, the appellant has carried on a general telephone business throughout the state of California, including the city of Pomona, and in many parts of Oregon, Washington, and Nevada, its lines of poles and wires in Pomona being an integral part of its system, and its subscribers and all other persons using its system in any place in the states or terri-

tories mentioned, holding conversations from time to time by telephone with other subscribers and persons in other cities and places reached by the said system. On the 8th day of August, 1898, the term of the franchise granted by the aforesaid ordinance numbered 30 to the appellant's aforesaid assignor expired by limitation, notwithstanding which the appellant, according to the record, continued to construct, maintain and operate its telephone system in Pomona without question on the part of the city as to its right to use the public streets and highways therein for its poles and wires until February 2, 1899, when the Board of Trustees of the city for the first time notified the appellant that it had "no franchise, privilege,
673 or other legal right in the city." The record shows subsequent extensions and changes of the appellant's poles and wires in the city, made with the consent, and, in some instances, at the suggestion of the city, but the contentions of the respective parties were such from and after February 2, 1899, that no consent on the part of the city to the permanent maintenance of the appellant's poles and wires in the streets of the city without the procurement of a franchise from it, can be properly affirmed of the matters occurring subsequent to that date. At no time, so far as the record shows, has the appellant disputed the exercise by the city of its police power in the matter of designating and indicating the places where, in the streets and highways of the city, appellant's poles should be set and its wires strung, and until some time in the year 1903 the city had always, through its proper officers, made such designation. In the latter year, upon the making of applications by the appellant for permission to set new poles and to make extensions so as to accommodate its new subscribers, the city refused to grant such applications, upon the ground that the appellant should secure a franchise from it.

In effect, the court below treated the appellant's telephone system as if it constituted two separate and distinct systems—one interstate and the other intrastate. In our opinion there is no valid ground for such a view. The appellant's poles and wires were erected under and by virtue of a charter which empowered it to transact an interstate telephone business. That such companies, like telegraph companies, are important agencies in the transaction of interstate commerce is well settled. Muskogee Nat. Tel. Co. v. Hall, 118 Fed. 382; Southern Bell Telephone & Telegraph Co. v. Richmond, 78
674 Fed. 858, and cases there cited. Each pole and wire erected formed an integral part of that system, just as each rail and tie of an interstate railroad constitutes an integral part of its system. And if there be any statute conferring upon the appellant as an interstate telephone company the right to construct and maintain its poles and wires in the streets of the city of Pomona (subject, of course, to the proper exercise of the police power of the city), we do not understand that the company can be any more deprived of the right of transacting over the same wires intrastate business than can an interstate railroad company be deprived of the right of carrying over its road intrastate passengers and freight. The main question in the case, therefore, is we think, whether there was any statutory

authority for the erection and maintenance in the streets of Pomona of the appellant's poles and wires. As has already been said, the right of the city to impose a charge upon the company for the use of such portions of the city as it actually uses is not here involved.

Municipalities are the creatures of state legislatures, and are, of course, subject to state legislation. By its Constitution of 1879, California undertook, in respect to certain privileges in the streets of the cities and towns of the state, to control even the power of the legislature of the state, and by section 19 of article XI of that instrument made a direct grant to the persons therein designated of the right to lay pipes in the streets of any city or town within the state, for the purpose of supplying such cities and towns and their inhabitants with water and light, such work to be done under the direction of the superintendent of streets, and under such general regulations as the municipality should prescribe, for "damages and
675 indemnity for damages," and with the right on the part of the municipality to regulate the charges therefor. See People v. Stephens, 62 Cal. 209. In the subsequent case in re Johnston, 137 Cal. 115, 120, the Supreme Court of California said: "When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of its exercise. The provision that the work is to be done under the direction of the superintendent of streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment." And the Supreme Court of California then proceeded to refer with approval to the case of Township of Summit v. New York etc. Tel. Co., 57 N. J. Eq. 123, saying: "Under the statutes of New Jersey any telephone company was authorized to use the public roads and highways on the line of its route for the purpose of erecting poles thereon to suspend its wires and other fixtures, upon first obtaining the consent of the owner of the soil, with the proviso that the use of the public streets in
676 any incorporated cities and towns of the state should be subject to such regulations and restrictions as might be imposed by the corporate authorities of said cities and towns. The authorities of the township of Summit passed an ordinance that no wire should be stretched across any public street without the permission of the township committee. In an action to restrain a telephone company from stretching its wires across certain streets of the township the court held that this ordinance was not a 'regulation or restriction'

under the statute, and was therefore invalid, saying: 'A right to prevent the use of the streets for suspending wires, unless previous consent is obtained, if such a right be lawfully conferred, authorizes a refusal to consent at discretion and confers a virtual power of prohibition. The right to the use of the streets has been expressly granted by the legislature, and the power to prohibit or interdict this use so granted cannot be inferred from the declaration in the proviso annexed to the grant, that the use should be subject to such regulations and restrictions as may be imposed. The restrictions intended in such a proviso must be held to be restrictions in the nature of regulations and not restrictions which shall prohibit the use or impose new conditions to the power to exercise the franchise.' "

The Codes of California took effect January 1st, 1873. Section 286 of the Civil Code contained the provision that "Private corporations may be formed for any purpose for which individuals may lawfully associate themselves." At that time there was no specific provision in respect to telephone companies, but Section 536 of the same code provided as follows: "Telegraph corporations
677 may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters." Section 591 of the Penal Code provided that "Every person who maliciously takes down, removes, injures or obstructs any line of telegraph or any part thereof, or appurtenance or apparatus connected therewith, or severs any wire thereof, is guilty of a misdemeanor." Subsequently, and while the above provisions of the California statutes stood as quoted, the case of Davis vs. Pacific Telephone and Telegraph etc. Company (127 Cal. 512) came before the Supreme Court of the state, in which it became necessary for the court to determine whether the word "telegraph," used in section 591 of the Penal Code, also included in its meaning "telephone." In holding that it did, the Supreme Court, in our opinion, in effect held that the same word "telegraph" in Section 536 of the Civil Code of California also included within its meaning "telephone," since by Section 4480 of the Political Code of the state the legislature declared that "with relation to each other the provisions of the four codes must be construed (except as in the next two sections provided) (which two sections do not bear upon the present question) as though all such codes had been passed at the same moment of time, and were parts of the same statute." And it has been, in effect, so decided by the Supreme Court of California in several cases. People vs. Applegarth, 64 Cal. 229; People v. Dobbins, 73 Cal. 257; Bruner vs. Superior Court, 92 Cal. 239. In the latter case the court held that the word "elisor" as used in the
678 Code of Civil Procedure must be deemed to have been used with reference to its definition given in the Political Code—saying that by Section 4480 of the Political Code it is provided that "With relation to each other the provisions of the four codes must

be construed (except as in the next two sections provided,) as though all such codes had been passed at the same moment of time, and were parts of the same statutes. (The next two sections refer to cases of conflict, and have no application here). When, therefore, 'elisor' is used in one code, it must be taken to have been used with reference to its definition given in another code."

In its opinion the court below held that the case of Davis vs. Pacific Telephone and Telegraph Company, *supra,* "is not controlling authority in the Federal Courts for at least four reasons: First—The word 'telegraph' is so often employed throughout the country in legislative enactments and judicial decisions that its definition would seem to be a matter of general, rather than local, law. Second—The Davis case does not establish a rule of property, but only determines a question of criminal liability. Third—Said case is not a construction of Section 536 of the California Code, but simply a definition of the word 'telegraph' in Section 591 of the Penal Code of the state. In that case, the court, after giving to the word 'telegraph' a wider scope than consistent with its etymology, says: 'But is this construction justifiable in the case of the penal statute; Section 4 of our Penal Code provides that "the rule of the common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice." In contemplation of this
679 action, in recognition of the fact that a substantial identity exists between the two words, we think no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire.' Thus it appears that the conclusion of the court was reached only by disregarding the common law rule of strict construction, which Sec. 4 of the Penal Code requires to be done, whereas Section 536 of the Civil Code, being a grant from the State, upon its acceptance by the corporation, should be strictly construed. The Davis case, therefore, is not a construction of Section 536; on the contrary, the inference is a fair one, from the very language of the court, that if it had been passing upon said section under a strict rule of construction, a more limited meaning would have been given to the word 'telegraph', and telephone companies would have been excluded from the operation of the section."

It is undoubtedly true that the Federal courts are not bound by the decisions of the state courts upon questions of "general law." We are, however, unable to agree with the learned judge of the court below in his holding that the coenstruction placed by the Supreme Court of California upon the word "telegraph" in the sections of the state statute referred to, the effect of which was and necessarily is to affect property rights situated within the state, falls within any proper meaning of the terms "general law" as above used. That the appellant in erecting its poles and wires in the streets of the city of Pomona relied for its authority, at least in part, upon section 536 of the Civil Code of California is not only shown by the proof on the part of the appellant, but also appears from the

affidavit of the City Attorney of Pomona filed on behalf of
680 the city, in which that affiant says, among other things:
That William E. Dunn, of Los Angeles, one of the attorneys of said complainant company, has several times appeared before the Board of Trustees of said city, in behalf of said complainant company; that he has also called at my office and consulted with me in reference to the matter; that at the beginning of our endeavor to place Sunset on an equal basis with other citizens and corporations, said William E. Dunn relied principally upon section 536, Civil Code of the State of California as the source of authority for his said company, and that said section 536 gave his said company rights and privileges to operate within said city of Pomona independent of, separate from, and without regard to the rights or wishes of said city of Pomona or its Board of Trustees."

That a construction of a state statute by the highest court of the state which establishes a rule of property within the state, will be adopted by the Federal Courts, is well-established law. In such cases even the Supreme Court of the United States will change its own ruling to conform to the decision of the highest court of a state. In Green v. The Lessees of Henry Neal, 6 Pet. 289,297, the Supreme Court said: "It is admitted in the argument that this court, in giving a construction to a local law, will be influenced by the decisions of the local tribunals; but, it is contended, that when such a construction shall be given in conformity to those decisions, it must be considered final. That if the state shall change the rule, it does not comport either with the consistency or dignity of this tribunal, to adopt the change. Such a course, it is insisted, would recognize in the state courts a power to revise the decisions of this court, and fix the rule of property differently from its solemn adjudications.

That the federal court, when sitting within a state, is the
681 court of that state, being so constituted by the constitution and laws of the Union; and as such, has an equal right with the state courts to fix the construction of the local law. On all questions arising under the constitution and laws of the Union, this court may exercise a revising power; and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions, and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised. But the case is very different where a question arises under a local law. The decision of this question, by the highest judicial tribunal of a state, should be considered as final by this court; not because the state tribunal, in such a case, has any power to bind this court, but because, in the language of the court, in the case of Shelby v. Guy, 11 Wheat. 361, 'a fixed and received construction by a state in its own courts, makes a part of the statute law.' The same reason which influences this court to adopt the construction given to the local law, in the first instance, is not less strong in favor of following it, in the second if the state tribunals should change the construction." Nor is it accurate to say, as did the court below in its opinion, that, because a federal question is involved in this case,

the construction of the state statute by the highest court of California was not binding upon the Federal Court, which was therefore at liberty to exercise its own independent judgment in respect to the meaning of the state statute. The rule is that the Federal courts will not depart from, but on the contrary, will follow the construction of a state statute by the highest court of the state, when such construction is in favor of the contract relied on,
682 and not against it. That rule is thus stated by the Supreme Court of the United States in the recent case of Powers v. Detroit and Grand Haven Railway Company, 201 U. S. 543, 556, where it is said:

"It has been often decided by this court, so often that a citation of authorities is unnecessary, that the legislature of a State may, in the absence of special restrictions in its constitution, make a valid contract with a corporation in respect to taxation, and that such contract can be enforced against the state at the instance of the corporation. It is said that we are not concluded by a decision of the Supreme Court of a state in reference to the matter of contract; that while the rule is to accept the construction placed by that court upon its statutes, an exception is made in case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation. Douglas v. Kentucky, 168 U. S. 488. It is in order to uphold the provision of the Federal Constitution that no state shall pass a law impairing the obligation of a contract that this duty of independent judgment is cast upon this court. But here the Supreme Court of the state has ruled in favor of the continued existence of a corporation and the applicability of certain statutes, and when upon the face of such statutes a valid contract appears we accept the ruling that the statutes are valid and applicable enactments. In other words, the Supreme Court of the state having sustained the validity of a statute from which a contract is claimed, this court follows that decision, and starts with the question, what contract is shown by statute?" See, also, Minnesota Iron
683 Company v. Kline, 199 U. S. 593; Armour Packing Company v. Lacy, 200 U. S. 226; N. Y. Cent. R. R. Co. v. Miller, 202 U. S. 584, 595; Jefferson Branch Bank v. Skelly, 66 U. S. 436, 443, in which last case, in answer to an insistent and persistent claim that it was bound by the construction placed by the Supreme Court of Ohio upon statutory and constitutional provisions of that state, the Supreme Court of the United States said:

"We answer to this, as this court has repeatedly said, whenever occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court, with a single exception, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in the forms of law; or by the instrumentality of a state's authorized functionaries, in conformity with state legislation. It has never been denied, nor is

it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts."

Taking Section 536 of the Civil Code of California as originally enacted as including telephone as well as telegraph companies, as we think must be done in view of the decisions of the Supreme Court of the state to which reference has been made, it cannot be doubted that the erection by the appellant of its poles and wires in Pomona in the year 1889, and their maintenance and operation, was an acceptance by it of the provisions of that
684 statute, which thereby became a contract between the company and the state, secured by the Constitution of the United States against impairment by any subsequent state legislation. Specific reference need not, therefore, be made to the franchise acts of the state, the first of which was passed in 1893 (Stats. Cal. 1893, p. 298), further than to say that by those of March 11, 1901 (Stats. Cal. 1901, p. 265), and March 20, 1905 (Stats. Cal. 1905, 491-2), both telegraph and telephone lines doing an interstate business are expressly excepted from their provisions requiring a franchise from a municipality.

We have not overlooked the contention on the part of the appellees that Section 536 of the Civil Code of California violates certain provisions of the state Constitution, and is, therefore, void. In considering such a question Mr. Justice Harlan, while sitting in the Circuit Court in the case of Smith v. Fon Du Lac, 8 Fed. 289, said: "I have not forgotten what was said by the Supreme Court of the United States when required in Fletcher v. Peck, 6 Cranch, 128, to determine whether the legislature of Georgia had in a particular enactment violated the Constitution of that state. The court there said, speaking by Chief Justice Marshall, that 'the question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, be decided in the affirmative in a doubtful case.' The more recent decisions of the same court justify me, I think, in saying that a Federal Court, in determining the rights of parties under a state law, will never, in a doubtful case, adjudge such law to be in conflict with the state constitution unless sustained in so doing by some
distinct adjudication of the highest court of the State."
685 Certainly, in view of the decision of the Supreme Court of California in the Davis case, and especially the more recent decision of the same court in Western Union Telegraph Co. v. Visalia, (149 Cal. 744,) where the court expressly recognized the validity of that section by holding that the Western Union Telegraph Company had the right to have its telegraph lines in the streets of the city of Visalia not only by the act of Congress of July 24, 1866, "but also from section 536 of our Civil Code," no Federal

court would be justified in holding that that section violates any provision of the Constitution of Californiia.

The conclusion to which we have come is, we think, sustained by the cases of Abbott, et al. v. City of Duluty, 104 Fed. 833; City of Duluty v. Abbott, et al. 117 Fed. 137; City of Wichita v. Old Colony Trust Co., 132 Fed. 641; Northwestern Exchange Telephone Co. v. City of Minneapolis, 83 N. W. Rep. 527; 86 N. W. Rep. 69; City of Duluth v. Duluth Telephone Co., 87 N. W. Rep. 1127; State ex rel. Wisconsin Telephone Co. v. City of Sheboygan, et al., 90 N. W. Rep. 441,442; Farmer and Getz v. Columbiana Co. Telephone Co. 74 N. E. Rep. 1078, 1080; State, ex rel. Rocky Mountain Bell Telephone Co.v. Mayor, etc., of City of Red Lodge, 76 Pac. Rep. 58; Chamberlain, et al. v. Iowa Telephone Co., 93 N. W. Rep. 596; State v. Nebraska Telephone Co., 103 N. W. Rep. 120; Wisconsin Telegraph Co. v. Oskosh, 62 Wis. 32, and by the decision of Judge Beatty in the case of Sunset Telephone and Telegraph Co. v. City of Eureka, et al., in the Circuit Court for the Northern District of California.

686 For the reasons stated the judgment is reversed with directions to the court below to enter judgment for the complainant.

Opinion filed August 2, 1909, F. D. Monckton, Clerk U. S. Circuit Court of Appeals For the Ninth Circuit.)

687 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

THE CITY OF POMONA, a Municipal Corporation, et al., Appellees.

Dissenting Opinion U. S. Circuit Court of Appeals.

Gilbert, Circuit Judge, dissenting:

By the opinion of the majority of the court, it is held that the appellant has acquired a franchise for the use of the appellee's streets under and by virtue of Section 536 of the Civil Code of California, enacted March 21, 1872, which provided that "telegraph corporations may construct lines of telegraph along and upon any public road or highway along or across any of the waters or lands within the state," etc. It is matter of common knowledge that at the time of the adoption of the statute, telephones for public use were unknown. The opinion does not attempt to construe the statute, or to say that it authorizes the construction and maintenance of telephone lines, nor does it deny the doctrine that in construing a statute that meaning must be given to its words which they had at the date of the

Act, a doctrine which is well established by the authorities. 26 Am. and Eng. Enc. of Law 611, and cases there cited. In Wadsworth Board of Works v. United Telephone Co., 13 Q. B. D., 914 it was said that a word used in a statute must receive the popu-
688 lar meaning existing at the time when the Act of Parliament was passed. In Sharpe v. Wakefield, 22 Q. B. D., 242, Lord Esher said: "Words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted, or has altered the previous statute." Nor is it denied that in Richmond v. Southern Bell Telephone Co., 174 U. S. 761, the Supreme Court in construing a statute similar to Sec. 536 held that its provisions had no application to telephone companies. Said the Court in that case: "In common and technical language alike telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the title was passed. Telephone companies, therefore, are not within the category of the grantees of the privileges conferred by the statute." But the opinion of the majority of this court assumes that all of these considerations are to be disregarded, and that Section 536 of the Civil Code of California must be held to include telephone companies under the doctrine that a Federal Court is bound to follow the construction placed upon a state statute by the highest judicial tribunal of the state. It is not to be doubted that if the Supreme Court of California has placed a construction upon this precise statute, that construction must be adopted by a Federal Court. It is not asserted that this statute has ever been construed by the Supreme Court of California, but it is said that because that court has held in Davis v. Pacific Tel. & Tel. Co., 127 Cal. 313, that the word "telegraph" as used in an-
689 other statute, a section of the Criminal Code of that state, should be construed to include "telephone" a construction has been placed upon the word "telegraph" as used in Section 536 which this court is bound to follow. This proposition I confidently assert, is unsupported by reason or authority. While there is a prima facie presumption that the meaning of a word repeatedly used in the same statute is identical in all cases unless there is something to show a different intention, the presumption is at best a weak one, or as Endlich says (Section 387), "it is not of much weight." But such a prima facie presumption has not been held to apply to words used in different statutes. On the contrary, the doctrine is well sustained that there is no presumption that a word is used in the same sense in different statutes. In L. & N. R. Co. v. Gaines, 3 Fed. 266, it was held that the fact that the constitution of a state uses a word in one sense in one clause is no evidence that it is used in the same sense in every other clause, and that even in the same statute a word is often used with distinctly different meanings, the court giving to it in each instance the meaning which the legislature intended it to have in that particular connection. In State v. Knowles, 90 Md. 654, the Court said: "It may indeed well be con-

ceded that where a word susceptible of more than one meaning is repeated in the same Act or section of an act, (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the same sense; but where the subject matter to which the word refers is not the same in both clauses, or where the surrounding circumstances are different, this presumption must
690 yield to an adverse presumption furnished by an analysis of the various purposes of the law, and of the language in which those purposes are expressed." See also Henry v. Trustees, 48 Ohio St. 676, and cases there cited. Section 536 of the Civil Code and Section 591 of the Penal Code are subject to different rules of construction. The latter, was, in the Davis case, construed under the authority of Section 4 of the Penal Code which provided that "the rule of the common law that Penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice." But the construction of Section 536 is controlled by the general rule which is thus expressed in Knoxville Water Co. v. Knoxville, 200 U. S., 22: "Only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the Government or the public has any interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication." The provision of Section 4480 of the Political Code that with relation to time, the provisions of the four codes must be construed as though all such codes had been passed at the same moment of time, and were parts of the same statute, does not purport to say that a word used in the statutes shall have the same meaning wherever used and it has no bearing upon the question whether the Supreme Court of California has construed Sec. 536 of the Civil Code, and the decision of that court in Bruner v. The Superior Court, 92 Cal., 239 that under Section 4480 the word "elisor" as used in the Code of Civil Procedure must be deemed to have been used with
691 reference to its definition given in the Political Code, has no application here, for the reason that the word "telegraph" has not been defined in either of the codes as was the word "elisor."

In Wood v. Brady, 150 U. S. 18, it was held that the construction placed by a state court upon one statute implies no obligation on its part to put the same construction upon a different statute, although the language of the two may be similar. In Carroll v. Carroll's Lessee, 16 How. 275, it was held that the construction placed upon a state statute by the highest court of that state in a case where the decision did not necessarily involve the construction of the statute, is not binding on the Federal Courts. In Cæsar v. Capell, 83 Fed. 403, it was held that while Federal Courts follow the construction of the state statutes given by the courts of the state, they are not required to adopt a construction based on implications from the language of a judicial opinion. In Southern Ry. Co. v. Simpson, 65 C. C. A. 563, it was held that the opinion of a state court of last

resort construing a state statute is conclusive on the Federal Court sitting in such state to the extent only of the precise question decided. Said Judge Lurton for the Court: "The opinion as a construction of the statute is authoritative to the extent of the precise question decided and no further."

I submit that not only has Section 536 not bee- construed by the Supreme Court of California, but that we have no means of knowing from any of the decisions of that court what construction would be placed upon it in a case involving its meaning. I think that the opinion of the court below, 164 Fed. 561, correctly disposes
692 of the questions of law involved in the case, and that the judgment should be affirmed.

(Endorsed:) Dissenting Opinion. Filed August 7, 1909. F. D. Monckton, Clerk.

693 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY (a Corporation), Appellant,

vs.

THE CITY OF POMONA (a Municipal Corporation), in the County of Los Angeles, State of California, The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, appellees.

Appeal from the Circuit Court of the United States for the Southern District of California, Southern Division.

Decree U. S. Circuit Court of Appeals.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs in favor of the appellant, and the cause is remanded to the said Circuit Court with directions to enter judgment for the complainant.

694 It is further ordered, adjudged and decreed by this Court that the appellant The Sunset Telephone and Telegraph Company, A Corporation, recover against the appellees The City of Pomona, a Municipal Corporation, in the County of Los Angeles, State of California, The Board of Trustees of the said City of

Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery as Members of, and Constituting the Board of Trustees of the said City of Pomona, S. C. Slanker as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe for its costs herein expended, and have execution therefor.

(Endorsed:) Decree. Filed and entered August 2, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

695 At a stated term, to wit: the October term A. D. 1909 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Monday the first day of November in the year of our Lord one thousand, nine hundred and nine.

Present:

The Honorable William B. Gilbert, Circuit Judge.
Honorable William W. Morrow, Circuit Judge.
Honorable William H. Hunt, District Judge.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

THE CITY OF POMONA, a Municipal Corporation, et al., Appellees.

Order Denying Petition and Supplemental Petition for a Rehearing.

It is ordered that the Petition and the Supplemental Petition for a Rehearing of the above-entitled cause be, and hereby are denied.

696 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678. In Equity.

THE CITY OF POMONA, a Municipal Corporation, in the County of Los Angeles, State of California; The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents and Appellants,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant and Appellee.

Petition for Allowance of Appeal.

The City of Pomona, a municipal corporation et al., the appellants above named, conceiving themselves aggrieved by the Judgment, Order and Final Decree of the above entitled court, made and entered by said court in the above-entitled cause on the second day of August, 1909, wherein and whereby it was ordered, adjudged and decreed that the judgment of the United States Circuit Court for the Ninth Judicial Circuit, Southern District of California, Southern Division, be reversed, and that the said court entered judgment for appellee, and wherein and whereby the judgment was
697 rendered for appellee, do hereby appeal from said judgment, Order and Final Decree of August second, 1909, to the United States Supreme Court, for the reasons specified in the Assignments of Error filed herein and herewith, and petition said court to allow them, said appellants, to prosecute an appeal to said United States Supreme Court, under and according to the laws of the United Statese in that behalf made and provided, and, also, that an order be made fixing the amount of a supersedeas bond, which the appellants shall give and furnishh upon said appeal, and that upon the giving of said bond, the status quo of the case be preserved and continue in full force and effect, pending and until the final determination of said appeal, the same as it existed during the appeal from said Circuit Court to said Circuit Court of Appeals, and that a transcript of the record, papers and proceedings, upon which said Judgment, Order and Final Decree was made, duly authenticated, may be sent to the United States Supreme Court.

And your petitioners will ever pray, etc.

Dated: Los Angeles, California, December 22, 1909.

J. W. JOOS,
ROBERT G. LOUCKS,
LESLIE R. HEWITT,
W. B. MATHEWS,
JOHN W. SHENK,
J. P. WOOD,
WM. J. CARR,
Attorneys for Appellants.

698 I, Charles D. Houghton, of counsel for the appellee herein, do hereby certify that in my judgment the foregoing petition for the allowance of an appeal is well founded in point of law, and that the said petition is not presented nor said appeal sought to be taken for delay.

CHARLES D. HOUGHTON,
Of Counsel.

(Endorsed:) Petition for Allowance of Appeal to the Supreme Court of the United States. Filed Dec. 23, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

699 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678. In Equity.

THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California; The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents and Appellants,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant and Appellee.

Order Allowing Appeal.

Upon motion of the attorneys for the appellants in the above-entitled action and upon the filing of a petition for appeal and Assignments of Error herein, it is ordered that an appeal be, and the same is hereby allowed to the United States Supreme Court, from the Judgment, Order and Final Decree entered herein on the second day of August, 1909, wherein and whereby judgment of the United States Circuit Court for the Ninth Judicial Circuit, Southern District of California, Southern Division, was reversed, and that the status quo of the case be preserved and continued in full force
700 and effect, pending and until the final determination of said appeal, the same as it existed during the appeal from said Circuit Court to said Circuit Court of Appeals, and that the amount of the supersedeas bond to be given by the appellants upon said appeal, be and the same is hereby fixed at the sum of Four Thousand dollars ($4000.00).

Dated: Los Angeles, California, December 22, 1909.

ERSKINE M. ROSS,
Circuit Judge.

(Endorsed:) Order Allowing Appeal. Filed Dec. 23, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

701 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678. In Equity.

THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California; The Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and L. F. Ulrey, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker; R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, Respondents and Appellants,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant and Appellee.

Assignments of Error

Now comes The City of Pomona, a municipal corporation in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe, appellants in the above-entitled action, by their attorneys,
702 and specify as errors committed by the United States Circuit Court of Appeals, for the Ninth Circuit, upon which they will rely, and urge their appeal in said action in the Supreme Court of the United States:

I.

That the said court erred in deciding that if said appellee under any statute had the right to do and carry on business as an interstate telephone company, it could not be deprived of the right of transacting over the same wires intrastate business.

II.

That the said court erred in deciding that the appellee's poles and wires were erected under and by virtue of a charter which empowered it to transact an interstate telephone business.

III.

That the said court erred in deciding that the appellee does an interstate telephone bsuiness to and from the City of Pomona from and to points in the States of California, Oregon, Washington and Nevada, and is entitled to construct, erect, maintain and operate its lines of

poles and wires in the streets and highways of the City of Pomona, without a special franchise therefor from the said city.

IV.

That the said Court erred in deciding that the lines of poles and wires of the appellee in the said City of Pomona are an integral part of the general telephone system of the appellee in the States of California, Oregon, Washington, and Nevada, whereby telephone messages are transmitted from and to points in each of said
703 states to and from all points in the telephone system of appellee in said City of Pomona.

V.

That the said court erred in deciding that the appellee does an interstate telephone business from and to all points reached by its telephone system, in the said City of Pomona, to and from points and places in the States of California, Oregon, Washington and Nevada.

VI.

That the said court erred in deciding that the appellee is lawfully maintaining its interstate and local lines in the streets of the City of Pomona.

VII.

That the said Court erred in deciding that the appellee has the right, under the provisions of Section 536 of the Civil Code of the State of California, to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the said City of Pomona for its telephone business, without a special franchise therefor from the said City.

VIII.

That the said court erred in deciding that the lines of poles and wires of the said appellee in Pomona are and were an integral part of its interstate system.

IX.

That the said court erred in deciding that the telephone lines of appellee, consisting of its poles and wires, constituted one entire and inseparable system.

704 X.

That the said Court erred in deciding that each pole and wire erected formed an integral part of that interstate system, just as each rail and tie of an interstate railroad constitutes an integral part of its system.

XI.

That the said court erred in deciding that Section 536 of the Civil Code of California grants to a telephone corporation any right to

maintain in a street poles and wires used in local or intrastate business.

XII.

That the said court erred in deciding that the construction, maintenance and operation of its lines by the appellee since the *the* year 1889 in the streets and highways of the City of Pomona, were an acceptance by the appellee of the terms of Section 536 of the Civil Code of California, and that a contract was thereby created between the State of California and the appellee which secured to the appellee the right and privilege of maintaining and operating its lines of poles and wires in the streets and highways of the said City of Pomona for its telephone business, without a special franchise therefor from said City.

XIII.

That the said court erred in deciding that Section 286 of the Civil Code, and Section 591 of the Penal Code, and Section 4480 of the Political Code constituted a rule for the construction of Section 536 of the Civil Code, so as to grant any right to appellee to construct and maintain its lines in the City of Pomona without a franchise therefor from the said City.

705 XIV.

That the said Circuit Court of Appeals erred in deciding that the Sunset Telephone and Telegraph Company, appellee, has the right to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of said City of Pomona for its telephone business, without a special franchise therefor from the said City of Pomona.

XV.

That the said court erred in deciding that the rights and privileges extended to telegraph corporations by Section 536 of the Civil Code of California, as originally passed March 21st, 1872, were also extended by that section to telephone corporations.

XVI.

That the said court erred in deciding that the construction of the word "telegraph" contained in Section 536 of the Civil Code, so often employed throughout the country in legislative enactments and judicial decisions, was a matter of local and not general law.

XVII.

That the said court erred in deciding that Section 536 of the Civil Code of California, which, prior to its re-enactment in 1905, applied in specific terms to telegraph corporations only, also applies to telephone corporations.

XVIII.

That the said court erred in deciding that the Supreme Court of the State of California has decided that the word "telegraph" as used in Section 536 of the Civil Code of California also in-
706 cluded within its meaning the word "telephone."

XIX.

That the said court erred in deciding that the word "telegraph" in Section 536 of the Civil Code of California also included within its meaning the word "telephone."

XX.

That the said court erred in deciding that the erection by the appellee of its poles and wires in Pomona in the year 1889 and their maintenance and operation was an acceptance by it of the provisions of Section 536 of the Civil Code of California, which thereby created a contract between that corporation and the State, secured by the Constitution of the United States against impairment by any subsequent state legislation.

XXI.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 23, 1893, entitled "An Act providing for the sale of railroad and other franchises in municipalities and relating to granting of franchises," repealed Section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXII.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 13, 1897, entitled "An Act providing for the sale of street railroad and other franchises in municipalities and providing conditions for the granting of such franchises by the legislative or other governing bodies, and repealing conflicting acts," repealed Section 536 of the
707 Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXIII.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 19, 1897, entitled "An Act to amend an act entitled 'An Act providing for the sale of railroad and other franchises in municipalities, and relating to granting of franchises,' approved March 23, 1893, by amending Section 1 of said Act," repealed Section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXIV.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 11, 1901, entitled "An Act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," repealed Section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXV.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 22, 1905, entitled "An Act Providing for the sale of street railroad and other franchises in counties and municipalities, and providing con-
708 ditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting Acts," repealed Section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXVI.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 23, 1893, entitled "An Act providing for the sale of railroad and other franchises in municipalities and relating to granting of franchises," excluded from the operation of Section 536 of the Civil Code of California all telephone or telegraph corporations doing an intrastate business within said City of Pomona.

XXVII.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 13, 1897, entitled "An Act providing for the sale of street railroad and other franchises in municipalities and providing conditions for the granting of such franchises by the legislative or other governing bodies, and repealing conflicting acts," excluded from the operation of Section 536 of the Civil Code of California all telephone or telegraph corporations doing an intrastate business within said City of Pomona.

XXVIII.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 19, 1897, entitled "An Act to amend an act entitled 'An Act providing for the sale of railroad and other franchises in municipalities, and relating to granting of franchises,' approved March 23, 1893, by
709 amending Section 1 of said Act," excluded from the operation of Section 536 of the Civil Code of California, all telephone or telegraph corporations doing an intrastate business within said City of Pomona.

XXIX.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 11, 1901, entitled "An Act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," excluded from the operation of Section 536 of the Civil Code of California all telephone or telegraph corporations doing an intrastate business within said City of Pomona.

XXX.

That the said court erred in refusing to decide that the Act of the Legislature of the State of California, approved March 22, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting Acts," excluded from the operation of Section 536 of the Civil Code of California, all telephone or telegraph corporations doing an intrastate business within said City of Pomona.

XXXI.

That the said court erred in refusing to decide that, under the provisions of Section 1 of the Act of the Legislature of the State of California, approved March 22, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," the appellee should obtain a franchise from said City of Pomona for the right to construct, erect, maintain and operate its lines for its telephone business upon and along the streets and highways of said City of Pomona.

XXXII.

That the said court erred in refusing to decide that Section 536 of the Civil Code of California is repugnant to the California Constitutions of 1849 and 1879.

XXXIII.

That the said court erred in deciding that said appellee conducts any telephone business within the City of Pomona, except an exclusively local telephone business.

XXXIV.

That the said court erred in refusing to decide that the Pacific States Telephone and Telegraph Company, and not the appellee, does all the long distance, intrastate, commercial telephone business to or from the City of Pomona, over the long distance lines involved herein.

XXXV.

That the said court erred in refusing to decide that the Pacific States Telephone and Telegraph Company, and not the appellee, does all the long distance, intrastate, commercial telegraph business, to or from the City of Pomona, over the long distance lines involved herein.

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XXXVI.

That the said court erred in deciding that appellee does any commercial interstate telephone business to or from said City of Pomona.

XXXVII.

That said court erred in deciding that said appellee does any commercial interstate telegraph business to or from said City of Pomona.

XXXVIII.

That said court erred in refusing to decide that the Pacific States Telephone and Telegraph Company, and not this appellee, owns, operates and controls all the long distance telephone lines in said City of Pomona involved herein.

XXXIX.

That said court erred in refusing to decide that the Pacific States Telephone and Telegraph Company, and not this appellee, owns, operates and controls all the long distance telegraph lines in said City of Pomona involved herein.

XL.

That the said court erred in refusing to decide that said appellee could not operate within said City of Pomona without the payment of a consideration to said city for the use and occupation of its streets.

XLI.

That the said court erred in deciding that appellants pay appellee costs in the sum of $1535.75, or any other sum.

712

XLII.

That the said court erred in refusing to decide that the Federal Telegraph Act of July 24, 1866, ch. 230, 14 Stat. 1, 221, gave no franchise rights or privileges whatever to said appellee for the operation and maintenance of its telephone lines within the said City of Pomona.

XLIII.

That the said court erred in deciding that the Act of Congress of July 24, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," (14 Stats. 221), which act

entered into the consideration of the Court below, should be omitted from all reference and consideration in determining the issues of this case.

XLIV.

That the said court erred in deciding that no question is presented by the record respecting the right of the city to make a charge against the appellee for the use of those portions of the streets actually occupied by it within said City of Pomona.

XLV.

That the said court erred in refusing to decide that Ordinance No. 30 of the City of Pomona granting to Sunset Telephone-Telegraph Company a franchise, constituted a contract between said city and said company which, upon assignment to said appellee, subjected said appellee to all terms, conditions and obligations thereof.

713

XLVI.

That the said court erred in deciding that there was any construction and maintenance, or either, by appellee, within the City of Pomona prior to the year 1898.

XLVII.

That said court erred in refusing to decide that subdivisions 13 and -4 of Section 764, and Section 763, of the Municipal Corporation Act approved March 13, 1883, entitled "An Act to provide for the organization, incorporation and government of municipal corporations," granted to said City of Pomona, as a municipality and agency of the state, the full power to grant or refuse franchises to said appellee, upon such terms and conditions as said city may deem proper, regardless of the provisions of Section 536 of the Civil Code.

XLVIII.

That the said court erred in reversing the judgment and decree of the lower court.

XLIX.

That the said court erred in not affirming the judgment and decree of the lower court.

L.

That the said court erred in ordering the entering of its final order and decree herein of August 2nd, 1909.

LI.

That the said court erred in ordering the issuance of the mandate issued herein on November 8th, 1909.

LII.

That the said court erred in assuming jurisdiction to hear
714 and determine the appeal from the trial court.

And for said errors appellant prays that said decision, judgment, order and decree of said United States Circuit Court of Appeals be reversed and that the decree of said United States Circuit Court be affirmed and ordered to stand as and for the final decree herein.

J. W. JOOS,
ROBERT G. LOUCKS,
LESLIE R. HEWITT,
W. B. MATHEWS,
JOHN W. SHENK,
J. P. WOOD,
WM. J. CARR,
Solicitors for Respondents and Appellants.

(Endorsed:) Assignment of Errors. Filed Dec. 23, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

715 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678. In Equity.

THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe, and Charles Foe, Respondents and Appellants,

vs.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant and Appellee.

Appeal and Supersedeas Bond.

Know all men by these presents: That we, the City of Pomona, a municipal corporation of the State of California, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, J. F. Ulery, S. C. Slanker, and R. G. Loucks, as principals, and the American Bonding Company of Baltimore, a corporation, as surety, are held and firmly bound unto the appellants in the above entitled action in the sum of Four Thousand Dollars ($4000.00), for which payment, well and truly to be made, we bind ourselves and each of us
716 jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 22nd day of December, one thousand nine hundred and nine.

Whereas, lately at a session of the United States Circuit Court of Appeals, for the Ninth Circuit, in a suit pending in said court between the said Sunset Telephone and Telegraph Company, a corporation, appellee, and the City of Pomona, a municipal corporation in the County of Los Angeles, State of California, the Board of Trustees of said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery as members of and constituting the Board of Trustees of the said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, appellants, a judgment and final decree was rendered, reversing the judgment of the United States Circuit Court for the Ninth Judicial Circuit, Southern District of California, Southern Division, and the appellants having obtained from said Circuit Court of Appeals an order allowing an appeal to the United States Supreme Court to reverse the aforesaid judgment and decree, and a citation, directed to the said appellee, is to be issued citing and admonishing it to be and appear at the United States Supreme Court, to be holden at Washington, D. C.

Now, therefore, the condition of this obligation is such that, if the said appellants shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded
717 against them, or either of them, if it shall fail to make said appeal good, then this obligation is to be void; otherwise to remain in full force and effect.

CITY OF POMONA,
A Municipal Corporation.
[SEAL.] By FRANK P. FREY,
President of the Board of Trustees of Said City of Pomona,
And by T. R. TROTTER,
City Clerk of said City of Pomona.
MEL CAMPBELL,
N. W. MILLER,
L. R. MATHEWS,
JOSEPH DOUGLAS,
J. F. ULERY,
S. C. SLANKER,
ROBERT G. LOUCKS,
By ROBERT G. LOUCKS,
Attorney for Appellants.
AMERICAN BONDING COMPANY OF BALTIMORE,
[SEAL.] By F. S. HUGHES, *Vice President.*

Attest:
E. M. GOOOWIN, *Ass't Secretary.*

718 STATE OF CALIFORNIA,
County of Los Angeles, ss:

Personally appeared before me F. S. Hughes on this 22nd day of December, one thousand nine hundred and nine, known to me to be the resident Vice-President of the American Bonding Company of Baltimore, a corporation described in and which executed the annex bond of City of Pomona et al., as surety thereon, and who being duly sworn, deposes and says that he resides at Los Angeles, in the State of California; that he is the said resident Vice-President of the American Bonding Company of Baltimore, and knows the corporate seal thereof; that the said Company is duly and legally incorporated under the laws of the State of Maryland; and duly licensed to transact its business in the State of California. That the seal affixed to the annex bond of City of Pomona et al., is the corporate seal of the American Bonding Company of Baltimore, and thereto affixed by order and authority of the Executive Committee of said Company; and that he signed his name thereto by like order and authority as resident Vice-President of said Company; and that he is acquainted with E. M. Goodwin and knows him to be the resident Assistant Secretary of said Company; and that the signature of said E. M. Goodwin subscribed to the said bond is in the genuine handwriting of said E. M. Goodwin and was thereto subscribed in the presence of said deponent;

Sworn to, acknowledged before me, and subscribed in my presence, this 22nd day of December, 1909.

[SEAL.] F. W. WEITZEL,
Notary Public.

719 The foregoing bond is hereby approved this 22nd day of December, 1909.

ERSKINE M. ROSS,
Circuit Judge.

(Endorsed:) Appeal and Supersedeas Bond. Filed Dec. 23, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

720 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678. In Equity.

THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe, and Charles Foe, Respondents and Appellants,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation Complainant and Appellee.

Order.

Good cause appearing therefor, it is hereby ordered that the original map, filed herein on behalf of the appellants on the 18th day of December, 1905, also the original Exhibit "F", being a Los Angeles Telephone Directory, also the original Exhibit "G", being a Los Angeles Telephone Directory, both of said directories filed on behalf of the appellants herein, and also two certified copies of orders of the Postmaster General of the United States numbered respectively 15 and 876, filed as Exhibits herein, be trans-
721 mitted by the Clerk of this Court to the Clerk of the United States Supreme Court, for use upon the appeal of the appellants herein; and it is hereby ordered that the Clerk of this Court do not make a copy of said map or either of said directories or of said two orders of the Postmaster General for the record on said appeal, it being hereby ordered by said Court that the original map and the originals of said directories, and said two orders are to be used as a part of the record upon said appeal in lieu of the copies thereof.

Dated: Los Angeles, California, December 22, 1909.

ERSKINE M. ROSS,
United States Circuit Judge.

(Endorsed:) Order Relative to Original Exhibits. Filed Dec. 23, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

722 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

THE CITY OF POMONA (a Municipal Corporation), in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe, and Charles Foe, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings and to Transcript of Record Upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from and including one (1) to and including fifty-five (55), to be a true copy of the Assignment of Errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion and dissenting opinion filed therein, as the same remain on file and of record in my office, and
723 that the same in connection with the preceding certified copy of the printed Transcript of Record constitute a true copy of the complete record in the above-entitled case, and, in connection with the following-entitled original exhibits, separately certified and accompanying this record, viz:

Respondent's Exhibits "G," and "F," and Exhibit "Map," Certified Copy of Rates of Pay for Communications by Telegraph, Order No. 15, and Certified Copy of Rates of Pay for Communications by Telegraph, Order No. 876, constitute the Transcript of Record upon appeal in the above-entitled cause to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this seventh day of January, A. D. 1910.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

724 In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1678. In Equity.

THE CITY OF POMONA, a Municipal Corporation in the County of Los Angeles, State of California; the Board of Trustees of the said City of Pomona; Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, and J. F. Ulery, as Members of and Constituting the Board of Trustees of said City of Pomona; S. C. Slanker, as the Superintendent of Streets in and for said City of Pomona; S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe, and Charles Foe, Respondents and Appellants,

vs.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Complainant and Appellee.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Sunset Telephone and Telegraph Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court, to be holden at the City of Washington in the District of Columbia, within sixty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the Circuit Court of Appeals for the Ninth Judicial Circuit, wherein the City of Pomona, a municipal corporation, in the County of Los Angeles, State of California, the Board of Trustees of the said City of Pomona, Mel Campbell,
725 N. W. Miller, L. R. Mathews, Joseph Douglas and J. F. Ulery, as members of and constituting the Board of Trustees of said City of Pomona, S. C. Slanker, as the Superintendent of Streets in and for the said City of Pomona, S. C. Slanker, R. G. Loucks, as City Attorney of said City of Pomona, R. G. Loucks, John Doe, Richard Roe and Charles Foe, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against said appellants, as in said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Erskine M. Ross, United States Circuit Judge for the Ninth Judicial Circuit, this 22d day of December, A. D., 1909.

ERSKINE M. ROSS,
United States Circuit Judge.

726 *Return on Service of Writ.*

Form No. 282.

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Citation on The Law Firm of Pillsbury Madison and Sutro by handing to and leaving a true and correct copy thereof with Albert Sutro a Member of said Law Firm of Pillsbury Madison and Sutro personally at San Francisco, Cal., in said District on the 24th day of December, A. D. 1909.

C. T. ELLIOTT,
U. S. Marshal,
By T. F. KIERNAN,
Office Deputy.

[Endorsed:] Marshal's Docket No. 5346. Original. No. 1678. Docketed in the United States Circuit Court of Appeals for the Ninth Circuit. The City of Pomona, a Municipal Corporation, et al., Respondents & Appellants, vs. Sunset Telephone & Telegraph Company, a Corporation, Complainant & Appellee. Citation. Filed Dec. 24, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. J. W. Joos, Robert G. Loucks, Leslie R. Hewitt, W. B. Mathews, John W. Shenck, J. P. Wood, Wm. J. Carr, Attorneys for Appellants.

Endorsed on cover: File No. 22,037. U. S. Circuit Court of Appeals, 9th Circuit. Term No. 215. The City of Pomona et al., appellants, vs. Sunset Telephone & Telegraph Company. Filed February 24th, 1910. File No. 22,037.

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IN THE

Supreme Court

OF THE

United States.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellee,

vs.

THE CITY OF POMONA (a municipal corporation), in the County of Los Angeles, State of California; the Board of Trustees of the said City of Pomona, Mel Campbell, N. W. Miller, L. R. Mathews, Joseph Douglas, J. F. Ulery, as members of and constituting the Board of Trustees of the said City of Pomona; S. C. Slarker, as the Superintendent of Streets in and for said City of Pomona; S. C Slanker, R. G. Loucks, as City Attorney of said City of Pomona; R. G. Loucks, John Doe, Richard Roe and Charles Foe,
Appellants.

BRIEF ON BEHALF OF APPELLANTS.

This case comes before this court on appeal from the order of the United States Circuit Court of Appeals for the Ninth Circuit, reversing the

judgment of the United States Circuit Court in and for the Southern District of California, which dissolved a temporary restraining order and dismissed the bill of complaint. It involves the right of the city of Pomona to control the exclusive appropriation of portions of its streets by telephone lines used for local or intrastate telephone business, and to require the appellee to secure a franchise for such purpose.

STATEMENT OF THE CASE.

The action was commenced on September 5, 1905, by the Sunset Telephone and Telegraph Company, a California corporation, against the city of Pomona, a municipal corporation of the fifth class, *et al.,* to enjoin the said city, its officers and agents from interfering with certain poles and wires maintained in the streets of Pomona by said company. [Tr. 13.]

On August 8, 1888, the city of Pomona passed an ordinance (No. 30) granting to Sunset Telephone-Telegraph Company (a corporation distinct and separate from and the predecessor in interest of the appellee) a franchise to erect and maintain for a period of ten years, poles and telephone wires along the streets of the city, which franchise expired by its own limitation on August 8, 1898. A copy of said ordinance is as follows:

"ORDINANCE No. 30.

"An ordinance of the city of Pomona granting to the Sunset Telephone-Telegraph Company (a corporation) the right to erect poles and telephone wires along the public streets of said city for a period of ten years.

"The board of trustees of the city of Pomona do ordain as follows:

"Section 1. The Sunset Telephone-Telegraph Company is hereby granted, for the period of ten years from date of passage and approval of this ordinance, the right, and are hereby authorized, to erect and maintain telephone poles and to run wires thereon over and along the public streets and thoroughfares of said city, subject to the provisions, limitations and restrictions, and on the conditions hereinafter contained.

"Sec. 2. Poles to be erected for the purpose mentioned in the preceding section shall be placed from one hundred and fifty to one hundred and eighty feet apart, but shall not be so placed as to in any manner obstruct or interfere with the free use of any street, alley, or driveway in said city. The outer face of all poles shall be placed within and adjoining the curb.

"Sec. 3. Telephone wires shall in all cases be suspended at a distance of at least nineteen feet from the ground, and maintained at that or a greater altitude at all points where wires are placed.

"Sec. 4. In case it shall at any time become necessary, in order to extinguish or prevent fire, or to protect property against loss or injury by fire in said city, to remove any of the poles or wires mentioned in the foregoing sections of this ordinance, the same may be removed by or under the direc-

tion of the fire department of said city, and such poles and wires shall be replaced and repaired by said corporation in its discretion, but at its own expense, and no charge shall ever be made against, nor claim allowed or paid by said city for any injury to such poles or wires necessarily caused by said fire department, as aforesaid.

"Sec. 5. This ordinance is passed and the franchise hereby provided for is granted on the further condition that said city, whenever, in the discretion of its board of trustees, it shall elect so to do, shall have the right to use such telephone poles for the purpose of suspending thereon or attaching thereto fire-alarm wires, at such reasonable convenient, and practicable point or place of such poles as may be designated by the grantees, provided that such fire-alarm wires shall be placed in position by or under the direction or supervision of said Telephone-Telegraph Company.

"Sec. 6. No private residence, building, or structure in said city shall be used by said Telephone-Telegraph Company for the purpose of suspending or supporting any of its telephone wires in said city without permission of the owner of such residence, building, or structure.

"Sec. 7. This ordinance shall take effect and be in force from and after the date of its publication.

"Approved this eighth day of August, 1888.

"CHARLES FRENCH,
"President of the Board of Trustees.

"Attest:

"ARZA CRABB,
"City Clerk." [Tr. 185-7.]

In April, 1889, the Sunset Telephone and Telegraph Company was incorporated under the laws of the state of California, and ever since has been and now is a resident and citizen of the state of California. [Tr. 3.]

In May, 1889, the grantee in said ordinance transferred all of its property, including said franchise, to the Sunset Telephone and Telegraph Company (hereinafter called the company), and since then the said company has maintained and operated its lines in said city. [Tr. 119.]

On the 6th day of June, 1905, the board of trustees of the city of Pomona passed and served upon the company a resolution, of which the following is a copy:

> "Whereas, the Sunset Telephone & Telegraph Company, a corporation, is now, and during all the times herein mentioned was, engaged in local telephone business in the city of Pomona; and
>
> "Whereas, said company obtained a right and franchise for telephone purposes only, from said city to enter and do business in said city for the period of ten years, on August 8, 1888, as evidenced by ordinance No. 30 of said city; and
>
> "Whereas, by the terms of said ordinance said franchise expired during the year 1898, and said company now has no franchise nor any right from said city, nor at all to use, occupy or obstruct the streets of said city for telephone purposes; and
>
> "Whereas, the trustees of said city have repeatedly requested and still request said company to secure from said city such a

franchise as will compel an observance of those or similar conditions contained in the franchise now held by the Pomona Valley Telephone & Telegragh Union, a corporation, so that there will be no discrimination between the two companies, doing in competition a similar local or state business;

"Therefore, be it resolved, that said Sunset Telephone & Telegraph Company be, and it is hereby, notified to appear before this board of trustees on Thursday, June 15, 1905, at 7:30 p. m., at the city hall, Pomona, California, to show cause, if any it has, why it should not obtain such franchise from said city, and upon its failure or refusal to immediately apply for and secure said franchise why the telephone poles and wires and apparatus of said company should not be declared a public nuisance, and the street superintendent of said city be instructed to remove said poles, wires and apparatus from the streets of said city; and

"Be it further resolved, that the city clerk be instructed to serve a certified copy of this resolution upon the said Sunset Telephone & Telegraph Company at its office in Pomona, California." [Tr. 6, 14, 15.]

On the 1st day of August, 1905, the said board of trustees passed and served upon the company a resolution, of which the following is a copy:

"Whereas, the Sunset Telephone & Telegraph Company, a corporation, by a resolution duly adopted June 6, 1905, a certified copy of which was served on said company, cited said company to appear before this board of trustees on Thursday, June 15, 1905, at 7:30 p. m., at the city hall, Pomona, California, to show cause, if any it has, why

it should not obtain a franchise from said city for the purpose stated in said resolution and citation, and upon default thereof why the telephone poles, wires and apparatus of said company should not be declared a public nuisance and removed from the streets of said city; and

"Whereas, at the time and place appointed said company failed to make any appearance in response to said resolution, and no showing at all having been made justifying its obstruction and occupancy of the streets of said city by said company;

"Therefore, be it resolved, that the telephone poles, wires and apparatus of said Sunset Telephone-Telegraph Company employed in doing state and local telephone business within the city of Pomona (and not including poles, wires and apparatus used exclusively for telephone business done to or from points without the state, and not including any poles, wires and apparatus used exclusively for telephone business done for the government of the United States, its officers or agent, if any), be and all of them are hereby declared to be an obstruction and a public nuisance on all the streets of said city; and

"Further resolved, that the street superintendent of said city be and he is hereby instructed to forbid and prevent any future installation, or extension of said telephone poles, wires and apparatus; and

"Further resolved, that unless said company obtains such a franchise from said city within thirty (30) days from date hereof, that the street superintendent of said city be and he is hereby further instructed to remove all said telephone poles, wires and apparatus from the streets of said city.

"The passage of this resolution is to be deemed a further notice to said company, and to give it an opportunity and thirty days more time in which to remove its said telephone poles, wires and apparatus from the streets of said city.

"The city clerk shall certify to the passage of this resolution and shall cause a certified copy of the same to be served upon said Sunset Telephone-Telegraph Company at its office in Pomona, California." [Tr. 6, 20, 122, 123.]

And on the 11th day of August, 1905, a notice was served upon the company, of which the following is a copy:

"To Sunset Telephone & Telegraph Company, a Corporation:

"In accordance with the instructions of the board of trustees of the city of Pomona, contained in its resolutions to the Sunset Telephone & Telegraph Company, made and dated respectively June 6, 1905, and August 1, 1905, and the laws in such cases made and provided, prescribing the powers and duties of street superintendent, the following notice is hereby given said Sunset Telephone & Telegraph Company:

"Under said resolutions and by virtue of the powers and duties of the office of street superintendent of said city, you are hereby notified that in accordance with the facts and conclusions stated in said resolutions, which are hereby made the facts and conclusions of the undersigned street superintendent, all the poles, wires and apparatus of said company employed in doing a state and local telephone business within the city of Pomona are hereby declared a public nuisance and

obstruction upon all the streets of said city and hereby ordered to be removed from all the streets of said city within thirty days from August 1, 1905, or I shall immediately proceed to remove the same.

"You are expressly and particularly notified that I will remove only the poles, wires and apparatus of said company doing a state and local telephone business within said city, and that I will not remove or in any manner interfere with, but as to such removal, will 'except telegraph or telephone lines doing an interstate business,' if any, and will also except from the order of removal all the poles, wires and apparatus of said company doing said 'interstate business,' if any.

"In event you do not voluntarily remove said poles, wires and apparatus doing said state and local telephone business, within said period of thirty days from August 1, 1905, then you are hereby solicited now and before said period of thirty days expires to co-operate with me and assist in the designation of the poles, wires and apparatus of said company doing said state and local telephone business, and in all other matters and things whatsoever, so that there will be no mistake and as little inconvenience as possible to said company and the public; also I desire at same time the designation by you of a place in which to put said poles, wires and apparatus.

"The words 'telephone' and 'telegraph' are not used synonymously, but according to their popular meaning and distinction.

"S. C. SLANKER,
"*Street Superintendent of the City of Pomona.*

"Dated August 10, 1905." [Tr. 6, 21, 123, 124.]

On the 1st day of September, 1905, two of the appellants, S. C. Slanker and R. G. Loucks, began the removal of certain of the company's telephone lines in said city, and continued to prosecute the same until the 5th day of September, 1905, when they were restrained from further interference with said lines by a temporary restraining order issued in this case. [Tr. 11, 124.]

The company claimed in the Circuit Court that in occupying the streets of the city of Pomona without a franchise granted by said city for that purpose, it was justified:

First: Under the act of congress of July 24, 1866, known as the "Federal Telegraph Act";

Second: Under the alleged claim that the business of the company was interstate commerce and free from the aforesaid interference by the city under subdivision 3 of section 8 of article I of the federal constitution.

Third: Under an alleged contract with the city of Pomona arising out of the construction of certain poles and lines in certain streets, and the expenditures of the moneys hereinbefore mentioned under alleged authority from the city subsequent to the expiration of its franchise granted by the city [Tr. 124];

Fourth: Under the provisions of section 536 of the Civil Code of California;

Fifth: Under the exception of telegraph and telephone lines doing an interstate business, con-

tained in the Broughton Act. (Stats. 1905, page 777.)

Following the issuance of the temporary restraining order, the case was heard upon its merits, being by stipulation submitted on affidavits, and the court, by the Honorable Olin Wellborn, dissolved the temporary restraining order and ordered the bill dismissed. The decision of the Circuit Court is found on pages 119 to 139, inclusive, of the transcript, and in Vol. 164 of the Federal Reporter, at pages 561 to 580, inclusive.

It was found and determined by the Circuit Court that the said company does a telephone business in the city of Pomona, California, and for this purpose has constructed and maintains local lines running from its central station to its subscribers in said city [Tr. p. 119]; that from August 8, 1898, the date of the expiration of ordinance No. 30, until about the middle of the year 1902, the company, in extending and enlarging its system in Pomona so as to accommodate new subscribers, expended more than $10,000, and about May, 1904, expended more than $6700 in changing and reconstructing its poles and wires on Second street in said city, and, in addition to said sums, expended $1500 in extension work subsequent to October 23, 1903. The company claims that said expenditures were made with the acquiescence and consent, and under the direction of the city, and further, that the ex-

penditure of $6700 was made also in consideration of the recognition by the city of the right of complainant to maintain and operate its system in said city without securing a franchise from the city. [Tr. p. 119.]

In the opinion of the Circuit Court it was held that the lines of the company were not telegraph lines, that said company was not a telegraph company within the meaning of the Act of July 24, 1866, and that the company derived no rights under said act. It was further held that section 536 of the Civil Code of California, prior to its repeal and re-enactment in 1905, extended no rights to telephone companies and that said section 536, as re-enacted in 1905 (Statutes 1905, p. 491), was repealed, except as to lines doing an interstate business, by the Franchise Act of 1905, commonly known as the "Broughton Act," and entitled, "An Act providing for the sale of street railway and other franchises in counties and municipalities, and providing conditions for the granting of such franchise by legislative or other governing bodies, and repealing conflicting acts," approved and in effect March 22, 1905 (Statutes 1905, p. 777).

The company thereupon perfected and prosecuted an appeal from the United States Circuit Court to the United States Circuit Court of Appeals for the Ninth District. Upon a determination of the appeal, the judgment of the Circuit

Court was reversed with directions to the lower court to enter judgment for the complainant company. The decision of the Circuit Court of Appeals is found on pages 347 to 356, inclusive, of the transcript, and in Vol. 172 of the Federal Reporter at pages 829 to 838, inclusive. The decision in the Circuit Court of Appeals was written by Judge Ross, and concurred in by Judge Morrow. Judge Gilbert filed a dissenting opinion which is found on pages 356 to 359, inclusive, of the transcript, and in Vol. 172 of the Federal Reporter at pages 838 to 840, inclusive.

In the majority opinion of the Court of Appeals it was held that the decision rendered by the Supreme Court of the state of California, in Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, in which it was held that the word "telegraph" as used in section 591 of the Penal Code must be construed to mean "telephone," was binding upon the federal courts as determining the meaning of the word "telegraph" as used in section 536 of the Civil Code prior to its repeal and re-enactment in 1905. This being so, the majority of the court was of the opinion that the company had vested and contractual rights under said section of the Civil Code which could not be affected by subsequent legislation.

Since the decision of the United States Circuit Court of Appeals, the Supreme Court of the state of California has handed down a series of

decisions which have an important bearing upon the issues herein.

In the case of Western Union Tel. Co. v. Hopkins, 116 Pac. 557, it was held that section 536 of the Civil Code was the grant from the state of a franchise to telegraph corporations to use the highways of the state for the construction and maintenance of their lines.

In the case of Sunset Tel. & Tel. Co. v. City of Pasadena, decided October 27th, 1911, and reported in volume 42 of California Decisions, page 593, it was held by the court in bank that the word "telegraph" as used in section 536 of the Civil Code as it stood prior to its repeal and re-enactment in 1905, did not include "telephone," and that a telephone company derived no rights thereunder.

For the reason that the decision of the State Supreme Court in the last mentioned case has not been published in the State Reports or Pacific Reporter, the opinion is set forth in full as an appendix hereto. The paging of the opinion as it appears in the California Decisions (advance sheets) is indicated by star paging. References in the brief to this decision will be to such star pages.

From the judgment of the Circuit Court of Appeals, this appeal is taken.

Statutory Provisions.

The statutory provisions which will be hereinafter principally referred to are section 536 of the Civil Code of the state of California as originally enacted in 1872 and as re-enacted in 1905, and an act entitled "An Act providing for the sale of street railway and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," approved March 22, 1905.

Section 536 of the Civil Code of California as enacted in 1872 and in force until its re-enactment in 1905, provided as follows:

> "Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutements for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway, or interrupt the navigation of the waters."

Said section 536 was re-enacted March 20, 1905 (in effect sixty days thereafter), to read as follows:

> "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters, or lands within this state, and may erect poles, posts, piers or abutements for supporting the insu-

lators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

The act entitled, "An Act providing for the sale of street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," approved March 22, 1905 (in effect immediately), provides as follows (except that section 2 was amended in 1909, in particulars not material here) (Stats. 1909, page 777):

"Sec. 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the

county or municipality an application, and thereupon said governing body shall, in its discretion, advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the county, city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily newspaper, and if there be no daily newspaper published in such county, city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty nor more than thirty days before any further action can be taken thereon.

"Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the county or municipality two per cent (2%) of the gross annual receipts of the person, partnership or corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided, further, that if

the franchise be a renewal of a right already in existence, the payment of said percentage of gross receipts shall begin at once.

"Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroad, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be conclusive as to the amount of the gross receipts of said extension.

"Sec. 5. Said advertisement shall also contain a statement that the said franchise will be struck off, sold and awarded to the person, firm or corporation who shall make the highest cash bid therefor; provided, only, that at the time of the opening of said bids any responsible person, firm or corporation, present or represented, may bid for said franchise or privilege, a sum not less than ten per cent above the highest sealed bid therefor, and said bid so made may be raised not less than ten per cent by any other responsible bidder, and said bidding may so continue until finally said franchise shall be struck off, sold, and awarded by said governing body to the highest bidder therefor in gold coin of the United States. Each sealed bid shall be accompanied with cash or a certified check payable to the treasurer of such county or municipality, for the full amount of said bid, and no sealed bids shall be considered unless said cash or check is enclosed therewith and the successful bidder shall deposit, at least ten per cent of the amount of his bid with the clerk of such county or municipality, before the franchise shall be struck off to him. And if he shall fail to

make such deposit immediately, then and in that case, his bid shall not be received, and shall be considered as void, and the said franchise shall then and there be again offered for sale to the bidder who shall make the highest cash bid therefor, subject to the same conditions as to deposit, as above mentioned. Said procedure shall be had until said franchise is struck off, sold, and awarded to a bidder who shall make the necessary deposit of at least ten per cent of the amount of his bid therefor, as herein provided. Said successful bidder shall deposit with the clerk of such county or municipality within twenty-four hours of the acceptance of his bid, the remaining ninety per cent of the amount thereof, and in case he or it shall fail to do so, then the said deposit theretofore made, shall be forfeited, and the said award of said franchise shall be void, and the said franchise shall then and there, by said governing body, be again offered for sale to the highest bidder therefor, in the same manner, and under the same restriction as hereinbefore provided, and in case said bidder shall fail to deposit with the clerk of such county or municipality, the remaining ninety per cent of his bid, within twenty-four hours after its acceptance, the award to him of said franchise shall be set aside, and the deposit theretofore made by him shall be forfeited, and no further proceedings for a sale of said franchise shall be had unless the same shall be readvertised and again offered for sale, in the manner hereinbefore provided.

"Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat

or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within said time said franchise so granted shall be declared forfeited, and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative body may by resolution extend the time for completion thereof, not exceeding three months.

"Sec. 7. The successful bidder for any franchise or privilege struck off, sold, and awarded under this act shall file a bond running to said county, city and county, or city or town, with, at least, two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed, and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and upon the filing and approval of such bond, the said franchise shall, by said governing or legislative body, be granted by ordinance to the person, firm or corporation to whom

it has been struck off, sold, or awarded, and in case that said bond shall not be so filed, the award of such franchise shall be set aside, and any money paid therefor shall be forfeited, and said franchise shall, in the discretion of said governing or legislative body, be readvertised, and again offered for sale in the same manner and under the same restrictions, as hereinbefore provided.

"Sec. 8. It shall be the duty of the attorney general, upon the complaint of any county or municipality, or in his discretion, upon the complaint of any taxpayer, to sue for the forfeiture of any franchise granted under the terms of this act, for the non-compliance with any condition thereof.

"Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one person, firm or corporation, as against another, in bidding for the purchase thereof.

"Sec. 10. Any member of any common council or other governing or legislative body of any county, city and county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

"Sec. 11. All acts, or parts of acts, in conflict herewith are hereby repealed; provided, however, that nothing herein contained shall be construed as repealing, or amending the

following acts, to-wit: 'An Act relating to the granting by the counties and municipalities of franchise for the construction of paths and roads for the use of bicycles and other horseless vehicles,' approved March twenty-seventh, eighteen hundred and ninety-seven; 'An Act to authorize cities and towns to grant franchises for the construction and maintenance of railroads beyond the limits of such cities or towns leading to public parks owned thereby,' being chapter forty of the laws of eighteen hundred and ninety-seven of the state of California.

"This act shall take effect immediately."

Statement of the Errors Relied Upon.

I.

That the said court erred in deciding that if said appellee under any statute had the right to do and carry on business as an interstate telephone company, it could not be deprived of the right of transacting over the same wires intrastate business.

II.

That the said court erred in deciding that the appellee's poles and wires were erected under and by virtue of a charter which empowered it to transact an interstate telephone business.

III.

That the said court erred in deciding that the appellee does an interstate telephone business to and from the city of Pomona from and to points in the states of California, Oregon, Washington and Nevada, and is entitled to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the city of Pomona, without a special franchise therefor from the said city.

IV.

That the said court erred in deciding that the

lines of poles and wires of the appellee in the said city of Pomona are an integral part of the general telephone system of the appellee in the states of California, Oregon, Washington and Nevada, whereby telephone messages are transmitted from and to points in each of said states to and from all points in the telephone system of appellee in said city of Pomona.

V.

That the said court erred in deciding that the appellee does an interstate telephone business from and to all points reached by its telephone system, in the said city of Pomona, to and from points and places in the states of California, Oregon, Washington and Nevada.

VI.

That the said court erred in deciding that the appellee is lawfully maintaining its interstate and local lines in the streets of the city of Pomona.

VII.

That the said court erred in deciding that the appellee has the right, under the provisions of section 536 of the Civil Code of the state of California, to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of the said city of Pomona for its telephone business, without a special franchise therefor from the said city.

IX.

That the said court erred in deciding that the telephone lines of appellee, consisting of its poles and wires, constituted one entire and inseparable system.

XI.

That the said court erred in deciding that section 536 of the Civil Code of California grants to a telephone corporation any right to maintain in a street poles and wires used in local or intrastate business.

XII.

That the said court erred in deciding that the construction, maintenance and operation of its lines by the appellee since the *the* year 1889 in the streets and highways of the city of Pomona, were an acceptance by the appellee of the terms of section 536 of the Civil Code of California, and that a contract was thereby created between the state of California and the appellee which secured to the appellee the right and privilege of maintaining and operating its lines of poles and wires in the streets and highways of the said city of Pomona for its telephone business, without a special franchise therefor from said city.

XIII.

That the said court erred in deciding that section 286 of the Civil Code, and section 591 of the Penal Code, and section 4480 of the Political Code constituted a rule for the construction of section 536 of the Civil Code, so as to grant any right to appellee to construct and maintain its lines in the city of Pomona without a franchise therefor from the said city.

XIV.

That the said court erred in deciding that the appellee has the right to construct, erect, maintain and operate its lines of poles and wires in the streets and highways of said city of Pomona for its telephone business, without a special franchise therefor from the said city of Pomona.

XVI.

That the said court erred in deciding that the construction of the word "telegraph" contained in section 536 of the Civil Code, so often employed throughout the country in legislative enactments and judicial decisions, was a matter of local and not general law.

XVII.

That the said court erred in deciding that section 536 of the Civil Code of California, which,

prior to its re-enactment in 1905, applied in specific terms to telegraph corporations only, also applies to telephone corporations.

XVIII.

That the said court erred in deciding that the Supreme Court of the state of California has decided that the word "telegraph" as used in section 536 of the Civil Code of California also included within its meaning the word "telephone."

XIX.

That the said court erred in deciding that the word "telegraph" in section 536 of the Civil Code of California also included within its meaning the word "telephone."

XX.

That the said court erred in deciding that the erection by the appellee of its poles and wires in Pomona in the year 1889 and their maintenance and operation was an acceptance by it of the provisions of section 536 of the Civil Code of California, which thereby created a contract between that corporation and the state, secured by the constitution of the United States against impairment by any subsequent state legislation.

XXI.

That the said court erred in refusing to decide that the act of the legislature of the state of California, approved March 23, 1893, entitled "An Act providing for the sale of railroad and other franchises in municipalities and relating to granting of franchises," repealed section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXII.

That the said court erred in refusing to decide that the act of the legislature of the state of California, approved March 13, 1897, entitled "An Act providing for the sale of street railroad and other franchises in municipalities and providing

conditions for the granting of such franchises by the legislative or other governing bodies, and repealing conflicting acts," repealed section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXIII.

That the said court erred in refusing to decide that the act of the legislature of the state of California, approved March 19, 1897, entitled "An Act to amend an act entitled 'An Act providing for the sale of railroad and other franchises in municipalities, and relating to granting of franchises,' approved March 23, 1893, by amending section 1 of said act," repealed section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXIV.

That the said court erred in refusing to decide that the act of the legislature of the state of California, approved March 11, 1901, entitled "An Act providing for the sale of street railroad and other franchises in municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies, and repealing conflicting acts," repealed section 536 of the Civil Code of California, so far as concerns telegraph and telephone corporations doing a local or intrastate business.

XXV.

That the said court erred in refusing to decide that the act of the legislature of the state of California, approved March 22, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," repealed section 536 of the Civil Code of California, so far as

concerns telegraph and telephone corporations doing a local or intrastate business.

XXXI.

That the said court erred in refusing to decide that, under the provisions of section 1 of the act of the legislature of the state of California, approved March 22, 1905, entitled "An Act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts," the appellee should obtain a franchise from said city of Pomona for the right to construct, erect, maintain and operate its lines for its telephone business upon and along the streets and highways of said city of Pomona.

XXXIII.

That the said court erred in deciding that said appellee conducts any telephone business within the city of Pomona, except an exclusively local telephone business.

XXXVI.

That the said court erred in deciding that appellee does any commercial interstate telephone business to or from said city of Pomona.

XXXVII.

That said court erred in deciding that said appellee does any commercial interstate telegraph business to or from said city of Pomona.

XL.

That the said court erred in refusing to decide that said appellee could not operate within said city of Pomona without the payment of a consideration to said city for the use and occupation of its streets.

XLI.

That the said court erred in deciding that appellants pay appellee costs in the sum of $1535.75, or any other sum.

XLIV.

That the said court erred in deciding that no question is presented by the record respecting the right of the city to make a charge against the appellee for the use of those portions of the streets actually occupied by it within said city of Pomona.

XLV.

That the said court erred in refusing to decide that ordinance No. 30 of the city of Pomona granting to Sunset Telephone-Telegraph Company a franchise, constituted a contract between said city and said company which, upon assignment to said appellee, subjected said appellee to all terms, conditions and obligations thereof.

XLVIII.

That the said court erred in reversing the judgment and decree of the lower court.

XLIX.

That the said court erred in not affirming the judgment and decree of the lower court.

L.

That the said court erred in ordering the entering of its final order and decree herein of August 2nd, 1909.

LI.

That the said court erred in ordering the issuance of the mandate issued herein on November 8th, 1909.

LII.

That the said court erred in assuming jurisdiction to hear and determine the appeal from the trial court.

BRIEF.

For the sake of greater clarity and brevity, we will not attempt to consider separately the several specifications of error relied upon, but instead will group our arguments and authorities under a series of headings which cover the controlling features of the case and set forth succinctly the grounds and reasons why, we contend, the decree of the Circuit Court of Appeals cannot stand.

Since the start of this litigation, through abandonment and by reason of determinations made by the state courts, many of the issues have been substantially eliminated. The respective rights of the city and the company on the merits will, we believe, turn upon the conclusions this court reaches upon two questions, one of law and one of fact. These are:

First: Was section 536 of the Civil Code as re-enacted in 1905 repealed, except as to lines doing an interstate business, by the Broughton Franchise Act? and

Second: Were any of the lines of the company at Pomona which were destroyed or threatened by the city "lines doing an interstate business"?

Both of these questions we consider under heading VII of the brief. Because the decision of the Court of Appeals turned upon the rights of the company under section 536 of the Civil Code as it stood prior to 1905 we consider this

section and its effect somewhat at length. If this court, however, accepts the conclusions of the Supreme Court of the state as to the scope and effect of this section prior to 1905 heading VI of the brief may be practically disregarded. The other questions involved (except the jurisdictional question) we pass briefly.

I.

The Circuit Court of Appeals had no jurisdiction to hear and determine the appeal from the Circuit Court. The decree of the Court of Appeals should therefore be reversed with directions to dismiss the appeal from the Circuit Court.

In a suit in the federal courts the question of jurisdiction is fundamental. It underlies all other questions arising in the course of the litigation and may be raised at any time, in any mode, by the court of its own motion or by the parties.

Krieder v. Cole, 149 Fed. 647, 649.

The presumption is that a case is without its jurisdiction unless the contrary affirmatively appears.

Montana Ore-Purchasing Co. v. Boston etc. Co., 85 Fed. 867, 869.

In the Circuit Court the company invoked the jurisdiction of the federal courts:

1st. By claiming rights under the act of congress of July 24, 1866, entitled "An Act to aid

in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes" (14 U. S. Stats. L. 221); and

2nd. By alleging that contract rights of the company under section 536 of the Civil Code of California, and further arising out of the acts of the city of Pomona in permitting the complainant company to maintain and operate its plant since August 8, 1898, had been impaired, in contravention of subdivision 1 of section 10 of article I of the constitution of the United States, and of section 1 of article XIV of the amendment to said constitution. [Tr. 124.] It also claimed certain rights under the interstate commerce clause of the constitution.

Section 5 of the Judiciary Act of March 3, 1891, provides, among other things, that appeals may be taken from the Circuit Court to the Supreme Court. "(4) In any case that involves the construction or application of the constitution of the United States." Section 6 of the same act provides that the Circuit Court of Appeals shall have appellate jurisdiction to review by appeal the final decision of the Circuit Court "in all cases other than those provided for in the preceding section," and its determination is made final in certain cases which have no application to the case at bar.

If the claim of rights by the company under the

Act of July 24, 1866, presents a question for federal jurisdiction, an appeal would lie to the Circuit Court of Appeals, under section 6, and that court would decide the whole case or certify the constitutional questions also involved to the Supreme Court, and proceed as thereupon advised, or an appeal would lie directly to the Supreme Court, under section 5 of the Judiciary Act.

Carter v. Roberts, 177 U. S. 496;
American Sugar Co. v. New Orleans, 181 U. S. 277.

If the claim of the company under the Act of July 24, 1866, does not present a question for federal jurisdiction, the Supreme Court has exclusive jurisdiction of this appeal.

Union & Planters Bank v. Memphis, 189 U. S. 71.

In that case, as in the case at bar, diversity of citizenship did not exist and the only federal question involved arose under the constitution. An appeal was taken to the Circuit Court of Appeals, and the Supreme Court reversed the decree, not on its merits, but by reason of want of jurisdiction in the Circuit Court of Appeals.

> "If this were not so," said the Supreme Court at page 74, "the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act. (Judiciary Act of 1891.) Robinson v. Caldwell, 165 U. S. 359; Loeb v. Trustees, 179

U. S. 472; American Sugar Refining Co. v. New Orleans, 181 U. S. 277."

But the company's claim under the Act of July 24, 1866, does not present a question for federal jurisdiction for two reasons:

First. Because its claim of rights under said act was never substantially involved in the case; and

Second. Because the rights of this company and similar corporations under that act have been determined by the Supreme Court, and have ceased to be federal questions. The rights of the complainant under the Act of July 24, 1866, were considered at length by the Circuit Court and determined against the complainant's contentions [Tr. 125], as were also the claims of complainant under section 536 of the Civil Code and resulting from the acts of the city of Pomona. [Tr. 131-139.]

Furthermore, on appeal to the Circuit Court of Appeals, counsel for the company, recognizing the futility of any claim under the Act of July 24, 1866, expressly disclaimed all rights under said act in the following language:

> "At the very outset in the brief of appellant (p. 3) and again upon the oral argument, we expressly stated that no point would upon this appeal be made upon the Act of July 24, 1866, nor upon the telegraph business done by the appellant, and that all reference to the same would be omitted. The Act of July 24, 1866, and the

> telegraph business of the appellant are, therefore, not before the court." (Company's reply brief in Circuit Court of Appeals, p. 2.)

The Circuit Court of Appeals recognized this abandonment or disclaimer under the Federal Telegraph Act in the following language [Tr. 349]:

> "While in the court below the complainant's alleged rights were in part based upon the Act of Congress of July 24, 1866, entitled 'An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes' (14 Stats. 221), which act entered into the consideration of the court below and is much discussed on the present appeal by counsel for the appellees, no right growing out of that act is here asserted on the part of the appellant, and hence we omit all reference to it."

In the Circuit Court the company claimed to have a telegraph instrument, installed not earlier than 1902, at its central station at Pomona. The court held that "the number of telegraph messages transmitted over its lines to and from Pomona is so inconsiderable as of itself to raise the question whether or not complainant may be fairly said, from a commercial standpoint, to be engaged in a telegraph business at that point. It is true, complainant's affidavits show, that, over all its long distance lines in California, Oregon, Washington and Nevada more than six thousand

messages are transmitted each month, and that sixteen per cent of these messages are by telegraph, but they are absolutely silent as to what portion of said sixteen per cent of telegraph messages reach Pomona. In this connection it is especially important to bear in mind that the burden is on the complainant to establish the telegraph and interstate character of its business (Penn. R. R. Co. v. Knight, 192 U. S. 21, 27), as well as every other ground essential to the equitable relief it seeks, and its failure while giving with precision other figures showing interstate and telegraph business over all its lines, to indicate how much of said business was done at Pomona, when the point is vital to its case, and the facts exclusively within its knowledge and easily accessible, is, under elementary rules of evidence, a strong, if not controlling circumstance against the claim, that its business at said place, is from a commercial point of view, interstate and telegraphic." [Tr. 127.]

The attitude of the company leads to the inevitable conclusion that its claims under said act from the beginning were not only not substantial, but were without color of merit. This conclusion is compelled by reference to the bill of complaint, wherein it appears that the only business of the company to which the city of Pomona directed its attention was its telephone business [Tr. 14, 15, 20, 21]; by the unchallenged holding

of the lower court that the business of the company at Pomona was not interstate and telegraphic; by the express abandonment on the part of the company of all claim of rights under the Act of July 24, 1866, and by the recognition by the Circuit Court of Appeals of that abandonment in the language of the opinion above quoted.

The Act of July 24, 1866, has been so thoroughly construed by the Supreme Court of the United States that appellee's claim under it has been determined and is no longer a federal question. This court has held that the privileges offered by that act and the rights acquired thereunder have no application to telephone companies.

Richmond v. Southern Bell Telephone Co., *supra.*

In that case this court said, at pages 777, 778:

> "We now adjudge only that the Act of 1866, and the sections of the revised statutes in which the provisions of that act have been preserved, have no application to telephone companies whose business is that of electrically transmitting articulate speech between different points."

It is not sufficient that rights under the Federal Telegraph Act be averred, but the company's rights must be substantially involved under the averments, and such rights cannot be substantially involved so as to present a federal question under the Act of July 24, 1866, if the prior decisions

of this court have foreclosed the question and rendered it a question not open to controversy.

Hannis Distilling Co. v. Baltimore, 216 U. S. 285.

In this case the court said, at page 288:

"A writ of error directly from this court was prosecuted upon the assumption that questions under the constitution of the United States were involved which gave a right to an immediate resort to this court for their solution. Upon the correctness of such assumption our jurisdiction depends. The assumption, however, may not be indulged in simply because it appears from the record that a federal question was averred, if such question be obviously frivolous or plainly unsubstantial, either because it is manifestly devoid of merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. Leonard v. Vicksburg S. & P. R. Co., 198 U. S. 416, 421, and cases cited; Delmar Jockey Club v. Missouri, 210 U. S. 324, 335; McGilvra v. Ross, 215 U. S. 70."

At page 292 the court further said:

"It follows that at the time the writ of error directly from this court was sued out, upon the assumed theory that the Maryland Act imposing the taxes sued for was repugnant to the due process clause of the constitution of the United States, such contention had been expressly decided to be without foundation by this court and therefore

> the proposition of federal right upon which alone the jurisdiction of this court depended was foreclosed and not open to controversy, and afforded no substantial basis for the writ of error, unless for some of the reasons alleged by counsel the case is taken out of this general principle."

In McGilvra v. Ross, 215 U. S. 70, it is said (quoting from syllabus):

> "While the construction of the act of congress under which a patent issued and what rights passed under the patent present federal questions which give the Circuit Court jurisdiction of the case as one arising under the laws of the United States, if prior decisions have so defined such rights that they are removed from controversy, jurisdiction does not exist in the absence of diverse citizenship."

In Leonard v. Vicksburg etc. R. R. Co., 198 U. S. 416, the court said (422):

> "The federal questions thus suggested had been so explicitly foreclosed by previous decisions as to leave no room for real controversy."

The federal courts will not recognize a claim for federal jurisdiction when the same legal points involved have been determined by the Supreme Court.

> Myrtle v. Nevada C. & O. Ry. Co., 137 Fed. 193.

In that case the court said, at pages 195, 196:

> "When a legal question arising under the constitution or a law or treaty of the United

States is decided by the Supreme Court, it ceases to be a federal question. State v. Bradley (C. C.), 26 Fed. 289; Austin v. Gagen (C. C.), 39 Fed. 626, 5 L. R. A. 476; Montana Ore P. Co. v. Boston Co., 85 Fed. 867, 29 C. C. A. 462; California Oil & G. Co. v. Miller (C. C.), 96 Fed. 12; Peabody G. M. Co. v. Gold Hill M. Co. (C. C.), 97 Fed. 657, 660."

A claim for federal jurisdiction in mere words is insufficient; "a substantial controversy must be presented."

Pacific Electric Railway v. Los Angeles, 194 U. S. 112;

Newburyport Water Co. v. Newburyport, 193 U. S. 561, 576.

In the last case cited this court said:

"If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of the constitutional question, if it plainly appears that such averment is not real or substantial, but is without color of merit."

Furthermore, the Act of 1866 does not confer upon telegraph companies the right to occupy with their poles, wires and other fixtures, the streets of a city without the latter's consent.

St. Louis v. Western Union Tel. Co., 148 U. S. 93;

St. Louis v. Western Union Tel. Co., 149 U. S. 465,

Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 540;

Western Union Tel. Co. v. Pennsylvania R. Co., 195 U. S. 594;

Postal Tel. & C. Co. v. Baltimore, 29 Atl. 819;

Postal Tel. & C. Co. v. Baltimore, 156 U. S. 210;

Richmond v. Southern Bell Telephone Co., 174 U. S. 761;

Toledo v. Western Union Tel. Co., 107 Fed. 10;

Cumberland Tel. & Tel. Co. v. Evansville, 127 Fed. 187.

From whatever angle the case at bar may be viewed, it stands in the same situation from a jurisdictional standpoint as if the claim of the company under the Act of July 24, 1866, had not been asserted in the Circuit Court, and the only federal question presented in the Circuit Court had been the claim of impairment of contract rights in violation of the federal constitution. The company, in law, is therefore placed in this position before the court: "We do not claim that the city of Pomona is interfering with our telegraph business, but because of interference with our telephone business we invoke the jurisdiction of the federal court, under the Telegraph Act,

which the Supreme Court has held not to include telephone business, and although the Telegraph Act has been so construed as not to permit telegraph companies to occupy the public streets without the consent of local authorities, nevertheless we claim that it does, for the purpose of invoking federal jurisdiction."

We submit that the company cannot assert rights under the Act of July 24, 1866, because it is not engaged in the telegraph business in Pomona; that if it were engaged in the telegraph business in that city, the Act of 1866 has been so construed as to adjudicate the rights of the company under it, and its claims of rights thereunder has ceased to be a federal question. Therefore, the only federal question involved in the case is one for the construction or application of the constitution of the United States, and the Supreme Court had exclusive jurisdiction of the appeal.

II.

Poles and wires in the streets without permission given by competent authority are nuisances and may be abated. No user and no lapse of time can legalize the nuisance. The company can justify its invasion of the streets only by pointing to a particular statute or law authorizing it. The burden is on it to justify its use of the streets.

The obstruction of a public street or highway is a common nuisance.

L. T. Co. v. S. & W. W. R. Co., 41 Cal. 562;

Siskiyou Lumber etc. Co. v. Rostel, 121 Cal. 511;

Marini v. Graham, 67 Cal. 130;

Taylor v. Reynolds, 92 Cal. 573;

Vanderhurt v. Tholcke, 113 Cal. 147;

So. Pac. Co. v. City of Pomona, 144 Cal. 339;

Coverdale v. Edwards, 155 Ind. 374, 383;

City of Valparaiso v. Bozarth, 153 Ind. 536;

Baumgartner v. Hasty, 100 Ind. 57—5;

Indianapolis v. Miller, 27 Ind. 394;

A. R. Telegraph Co. v. Hess, 125 N. Y. 641, 13 L. R. A. 454;

D. L. & W. R. R. Co. v. City of Buffalo, 158 N. Y. 266, 478;

Daublin v. Mayor New Orleans, 1 Martin (La.) 185.

We quote briefly from Coverdale v. Edwards, *supra*, as follows:

> "If appellee had erected the poles in the streets without any lawful authority to do so, the poles would have constituted a public nuisance *per se*. City of Valparaiso v. Bozarth, 153 Ind. 536, 45 L. R. A. 487, and cases cited. *If the poles were erected under lawful authority, and if the authority was legally cancelled, appellee's failure or refusal to remove the poles after notice would render them a nuisance per se, and the city's right would then be complete to remove them summarily.*" (Italics ours.)

No user or lapse of time can legalize such a nuisance.

People v. Gold Run D. & M. Co., 66 Cal. 138;

Ex parte Taylor, 87 Cal. 91;

Bowen v. Wendt, 103 Cal. 236;

Town of Cloverdale v. Smith, 128 Cal. 230;

Webb v. Demopolis, 95 Ala. 116, 21 L. R. A. 62.

It devolves upon the company to justify the use of the streets by its poles and lines.

Sunset Tel. & Tel. Co. v. City of Pasadena, 42 Cal. Dec. 593-596 (see appendix);

D. L. & W. R. R. Co. v. City of Buffalo, 158 N. Y. 266, 272, 479, 478, 480.

In D. L. & W. R. R. Co. v. City of Buffalo, *supra*, it was said:

> "Nothing less than express authority to place these obstructions in the street will shelter the plaintiff from the consequences of creating a nuisance by the obstruction of a public highway. (Page 272.) * * * But whether the right (of a railroad) to occupy the streets proceeds directly from the legislature, or indirectly through the medium of local authorities, cannot affect the principle that in all such cases the party who obstructs or interferes with a public or private right must justify the invasion by pointing to a statute which specifically authorizes the particular thing complained of." (P. 480.)

The company in the Circuit Court sought to justify its use of the streets:

1st: Under the Act of Congress July 24, 1866, known as the Federal Telegraph Act.

2nd: Under the interstate commerce clause of the United States Constitution.

3rd: Under an alleged contract arising out of the construction of certain pole lines in certain streets, etc., under alleged authorization from the city subsequent to the expiration of its franchise from the city.

4th: Under the provisions of section 536 of the Civil Code of California.

5th: Under the exception of "telegraph and telephone lines doing an interstate business" contained in the Broughton Act (Statutes 1905, page 777).

III.

No claim of Right under the Act of Congress of July 24, 1866, (Federal Telegraph Act) is here presented.

In the "Brief of appellant (the company) in reply to brief and supplemental brief of appellees, and in reply to brief of *Amicus Curiae*," filed in the United States Circuit Court of Appeals, at page 2, it is said:

"At the very outset in the brief of appellant (page 3), and again upon the oral argument, we expressly stated that no point would upon this appeal be made upon the Act of July 24, 1866, nor upon the telegraph business done by the appellant, and that all reference to the same would be omitted. The Act of July 24, 1866, and the telegraph business of the appellant are, therefore, not before the court."

This express abandonment of all claim under the Federal Telegraph Act was recognized in the opinion delivered in the Circuit Court of Appeals [172 Fed. 829, Tr. 348], where it is said: "No right growing out of that act (Act of July 24, 1866) is here asserted on the part of the appellant, and hence we omit all reference to it."

It appears that in the case of Sunset Tel. & Tel. Co. v. City of Pasadena, 42 Cal. Dec. 593 (see Appendix), claims under the Act of Congress of July 24th, 1866, were advanced by the company in the lower court, just as in this litigation, and were subsequently expressly abandoned, as here.

Thus it is said at page 596 of the opinion:

> "It was claimed by plaintiff in the lower court that such a grant was to be found in the provisions of the Act of Congress of July 24, 1866, entitled, 'An Act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal and military purposes,' the plaintiff being a telegraph as well as a telephone company and having accepted the provisions of said act in the year 1897. For all the purposes of this appeal, this claim has been expressly abandoned by plaintiff."

Under these circumstances it would be a work of supererogation hereto enter into a discussion of the effect of the Federal Telegraph Act, or the question whether or not the lines of the company are telegraph lines within the meaning of the act.

IV.

The interstate commerce clause of the Constitution does not in itself confer upon the company the right to appropriate for the maintenance of its system portions of the streets of the city of Pomona. Competent authority from the state therefore is necessary.

Under Part VII of this brief will be found a consideration of the facts bearing upon the question whether or not the lines of the company at Pomona destroyed or threatened by the city were lines "doing an interstate business." Even if they were, in the absence of authority from the state, they occupy no different position than lines doing

a purely local business. The interstate commerce clause is not the grant of a franchise to use the streets. As tersely said in *Sunset Tel. & Tel. Co. v. Pasadena*, 42 Cal. Dec. 593 (see appendix):

> "It is, of course, not claimed and could not well be claimed, that the mere fact that one is engaged in interstate commerce gives him the right to permanently occupy, to the exclusion of the public, portions of public highways of the state, either within or without cities, in the absence of permission to do so from proper state authority."

The federal constitution, in vesting in congress the power to regulate interstate business and withdrawing such power of regulation from the states, did not attempt to, and could not, furnish interstate companies with the *property* with which to carry on their business. That they must provide for themselves, whether it be the purchasing of poles or the purchasing of the ground upon which to place them, or the purchase of an easement therein or franchise thereover. As stated in N. W. Tel. Exch. Co. v. City of St. Charles, 154 Fed. 386:

> "I mean, by that, that they (an interstate telephone or telegraph company) would have no right of way, simply because the instrumentality would be used for interstate commerce, other than it would have if it was only suitable for any other public use. A railroad company, or a telegraph company, or a telephone company, would have to supply its own instrument, its railroad, its telegraph line,

> its telephone line, without any reference to what its use would be, in the ordinary manner. It would have to obtain its right of way, either by a grant or license from the state where it was upon the highways of the state, or by purchase or condemnation where it was upon private property. Therefore I do not see that the fact that this is an instrument of interstate commerce, affects the decision of the case at all, or has any bearing upon it."

Nor do the provisions of the federal constitution or the act of congress enable interstate companies to maintain their property or instrumentalities for conducting their business upon private property without the consent of the individuals or state, or subdivision of the state, which has the control over them, whether that control arises out of an ownership of the fee, or a leasehold interest or in the ordinary control which cities have over their streets. Their consent must be obtained. The federal constitution only says to the state as, of course, to individuals, "You can not interfere with interstate *business.*" It does not say "You must allow the *instrumentalities* thereof to be placed upon the property that you control without your consent or without payment of compensation." Nor does it say "If these instrumentalities are placed upon your property without your consent or the period of your consent has expired you may not remove these instrumentalities from your property simply because they are doing an interstate business."

The companies must provide their own appliances and procure the place therefor.

It is to be borne in mind that no question is here presented of the state, by action or inaction, attempting to regulate, burden or discriminate against interstate commerce.

If the company has any right in the streets of the city of Pomona by reason of the fact that its lines in said city are engaged in carrying on an interstate business, that right is to be ascribed solely to section 536 of the Civil Code as reenacted in 1905, and which as to "lines doing an interstate business" was not repealed by the Broughton Act, (see heading VII hereof), and not to the interstate commerce clause of the constitution.

V.

The expenditure of money by the company and the extension of its system, even though with the consent or at the request of the city, furnishes no authority to the company to maintain its lines. The mode whereby the city may contract or grant a privilege being prescribed, that mode constitutes the measure of the city's power in such respect, and any right granted or claimed otherwise is a mere nullity. Estoppel will not lie against the city in such case to deny the existence of the contract or privilege.

Statutes 1893, p. 288;
Statutes 1897, p. 135;

Statutes 1901, p. 265;
Statutes 1903, p. 90;
Statutes 1905, p. 777.

The statutes cited above, a statement of the purport of which may be found in the opinion of the Circuit Court [164 Fed. 561, 577, Tr. 136, 137], governed the city of Pomona during the period when the alleged contract arose and prescribed the measure of the city's power to contract. Any action not in accord therewith was a nullity.

The propositions stated in the heading find full support in the following cases:

People *ex rel.* Dean v. Contra Costa County, 122 Cal. 421, 422;

Pac. Electric Ry. Co. v. Los Angeles, 194 U. S. 112;

Town of Pelham v. Pelham Tel. Co., 62 S. E. (Ga.) 186;

Tri-State Tel. & Tel. Co. v. City of Thief River Falls, 183 Fed. 854;

Zottman v. San Francisco, 20 Cal. 96;

Times Pub. Co. v. Weatherby, 139 Cal. 618;

Frick v. City of Los Angeles, 115 Cal. 512;

Wichmann v. City of Placerville, 147 Cal. 162, 164, 165;

Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628;

McCoy v. Briant, 53 Cal. 247;
French v. Teschemaker, 24 Cal. 518, 550, 551;
Brady v. Mayor etc. of N. Y., 16 How. Pr. 432, 444, 443, 445-447;
Arnott v. Spokane, 6 Wash. 442, 33 Pac. 1063;
Chippewa Bridge Co. v. City of Durand (Wis.), 99 N. W. 603;
Murphy v. Louisville (Ky.), 9 Bush 189;
Jersey City Oil Supply Co. v. Mayor, 60 Atl. 381;
City of Providence v. Prov. Elec. Lighting Co., 91 S. W. (Ky.) 664.

We quote from City of Providence v. Providence Elec. Lighting Co., *supra,* as follows:

> "Compliance with Const. Sec. 164, providing that before granting a franchise or privilege, or making any contract in reference thereto, a municipality shall first, after due advertisement, receive bids therefor publicly and award the same to the highest and best bidder, is essential to the validity of a contract by a city with a lighting company for lighting." (Syl.)

VI.

Section 536 of the Civil Code, prior to its repeal and re-enactment in 1905, in terms applied only to telegraph corporations and to lines of telegraph. It did not apply to telephone corporations nor purport to confer any rights in the highways as to telephone wires or lines. The company derived no rights thereunder to construct or maintain telephone poles, lines or wires in the streets of the city of Pomona.

THE LINES AND WIRES OF THE COMPANY IN THE CITY OF POMONA, WHICH WERE DESTROYED OR THREATENED BY THE CITY, WERE NOT TELEGRAPH LINES OR WIRES, BUT WERE TELEPHONE LINES AND WIRES.

It is apparent that the action of the city of Pomona, which precipitated the present litigation, was directed entirely against the telephone lines of the company. The resolution of June 6th, 1905 (Exhibit 1 to Bill, Tr. 14, 15), has reference only to telephone poles and wires. The same is true in regard to the resolution of August 1st, 1905 (Exhibit 3 to Bill, Tr. 20). This resolution furthermore makes specific exception of telephone lines doing an interstate business. Again, the notice of August 10th, 1905, from the superintendent of streets (Exhibit 4 to Bill, Tr. 21), makes specific exception of "telegraph or telephone lines doing an in-

terstate business." The body of the notice refers simply to telephone lines doing a state and local business. The company is asked to co-operate in designating the poles and wires of the company doing a state or local business.

Attention is directed to the abandonment of all claim under the Federal Telegraph Act and to being a telegraph company, made by the appellee, considered under heading 3 hereof; also to the conclusions of the Circuit Court herein. [Tr. 125-128.]

Furthermore, the company's claim that the lines of its Pomona system are telegraph lines is based upon the theory that telegraph messages received at the central station and communicated to the various local subscribers by "articulate speech" invests such lines with the character of telegraph lines. This theory is erroneous. Such local lines are no intrinsic part of any *telegraph* lines. The telegraph instrument or instruments are situated at the central station of the telephone company and telegraph messages *per se,* interstate or intrastate, if transmitted at all, are received at that station. The telegraph transmission then ceases. The mere fact that the messages may be telephoned to subscribers, or other persons in the city, or that persons may send messages to the company's office for telegraphic transmission by telephoning them to such office, does not make the telephone system to sub-

scribers, a part of the telegraph system. Only the main toll line extending from the central station to points outside the city can, by any construction, be regarded as a telegraph line. It is the only line engaged in telegraph business. The local telephone lines are no more a part of the telegraph lines than the United States mail would be if the telegram were received at the central office and mailed to the receiver. They are no more a part of any telegraph system, or of the telegraph transmission, than the messenger boy who bears the telegraph message to the consignee would be, or a telephone system not owned by the company, but used to communicate the message, would be.

City of Richmond v. Southern Bell T. & T. Co., 174 U. S. 761, 773, 43 L. Ed. 1162;

City of Toledo v. Western Union Tel. Co. (C. C. A.), 107 Fed. 10;

Cumberland Tel. & Tel. Co. v. City of Evansville, 127 Fed. 187.

NO RIGHTS WERE ACQUIRED BY THE COMPANY UNDER SECTION 536 OF THE CIVIL CODE PRIOR TO ITS REPEAL AND RE-ENACTMENT IN 1905. THE WORD "TELEGRAPH" AS THEREIN USED DOES NOT INCLUDE "TELEPHONE."

The decision of the Circuit Court of Appeals passed upon the ground that although the system

of the company in the city of Pomona was a telephone system, nevertheless the word "telegraph" as used in section 536 included "telephone," and that therefore the company had acquired vested and contractual rights under said section. The court was of the opinion that the decision of the Supreme Court of California in Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, in which the word "telegraph" as used in section 591 of the Penal Code was held to include within its meaning "telephone" settled the meaning of the word "telegraph" as used in section 536, and that the federal courts were bound by the decision of the state court. Since the opinion of the Circuit Court of Appeals was handed down, the state Supreme Court, in bank, in the case of Sunset Tel. & Tel. Co. v. City of Pasadena, 42 Cal. Dec. 593 (see Appendix), arrived at a contrary conclusion and held that the word "telegraph" as used in section 536 did not include "telephone," and that it was not bound by its decision in the case of Davis v. Pacific Tel. & Tel. Co., *supra*. Because we believe that this court will adopt the conclusions of the state court in this case as settling the meaning and effect of section 536, we quote at length from the opinion:

> "Plaintiff's claim of right to use the streets of Pasadena for its poles and wires without permission from the city is based principally upon section 536 of the Civil Code, providing ever since its re-enactment

in 1905 that 'telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.' Prior to its re-enactment in 1905 this section did not in express terms include telephone corporations or telephone lines, and it is very earnestly argued by defendants and was held by the learned trial judge that until such re-enactment the section was not applicable to telephone corporations or lines.

"Section 536 Civil Code was a part of the original Civil Code, adopted in 1872, and was never changed or amended in any respect until its repeal and re-enactment in the year 1905. As we have already stated, until the year 1905 it contained no reference in terms to telephone corporations, reading: 'Telegraph corporations may construct lines of telegraph along and upon,' etc. In the recent case of Western Union Telegraph Co. v. Hopkins, 41 Cal. Dec. 640, we considered the effect of this section, so far as telegraph corporations are concerned. It was there concluded that the section is operative to effect a grant to all telegraph corporations so far as acceptance of its provisions by construction and maintenance of its lines in public highways is had, in the absence of later enactment having the effect of repealing the same or suspending its operation as to particular portions of the state, and that in so far as such acceptance is had prior to

any such repeal or suspension, and to the extent of the actual occupation by any corporation of public streets constituting such acceptance, a vested right accrues to the corporation, subject only to the lawful exercise of the police power, of which it cannot be deprived at the instance of the state without compensation. This, as his opinion indicates, was the view of the learned judge of the trial court in this case.

"This construction makes the section a pure grant by the state of a franchise in its highways, one, as suggested by defendants, 'of incalculable value and importance.' It is a well settled principle that grants contained in public statutes or made by public officers or public bodies are to be strictly construed in favor of the public, the rule being clearly stated in Knoxville Water Co. v. Knoxville, 200 U. S. 22, 33, as follows: 'Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication.' This rule of construction of public grants has been incorporated in our Civil Code, section 1069 of the Civil Code providing: 'A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, *and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.*' The italics are, of course, ours. (See opinion of Chief Justice Beatty in Oakland v. Oakland Water Front Co., 118 Cal. 174 and 175, and Clark v. City of Los Angeles, decided May 31, 1911, 41 Cal. Dec. 589. * * *

We can see no good reason why the rule of strict construction in favor of the public is not applicable to this section, which is purely a grant by the state of valuable rights.

"In view of this rule we are satisfied that the decision in Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, cannot be taken as definitely settling the meaning of the word 'telegraph,' as the same is used in section 536 of the Civil Code. The question there was whether the words 'any line of telegraph,' as used in section 591 Penal Code as it existed prior to the year 1905, included a telephone line. The section made it a misdemeanor for any one to maliciously take down, remove, injure or obstruct 'any line of telegraph,' or to sever any wire thereof. After showing that in numerous cases in other jurisdictions the courts had held that 'telephone' is included within the meaning of 'telegraph,' the court said that 'if the consideration could be limited to a strict etymological point of view, it would have to be conceded at once that there is a difference in the meaning of the two words, the one conveying the idea of transmission of writing to a distance, the other the transmission of sound to a distance.' But it was declared that in their 'present sense and acceptation' the term 'telegraph' means 'any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word 'telephone.'" It was held that in contemplation of section 4 of the Penal Code, which provides that the rule of the common law that penal statutes are to be strictly construed has no application to the code, and that 'all its provisions are to be construed according to the fair import of their terms with a view

to effect its object and to promote justice,' and in recognition of the fact that a substantial identity exists between the two words, no hesitation need be expressed in declaring that under section 591 of the Penal Code a criminal prosecution will lie for the illegal destruction of a telephone wire.

"When we consider the rules applicable in the construction of public grants, it seems at once apparent, in view of the fact that the telephone was absolutely unknown at the time of the enactment of section 536 Civil Code, that the decision in Davis v. Pacific Tel. & Tel. Co., *supra,* is not controlling here. There is no rule of law that necessarily requires the same meaning to be given to the same word used in different places in the same statute. It is plain that section 4480 of the Political Code, as was said by Judge Gilbert in his dissenting opinion in Sunset Tel. & Tel. Co. v. Pomona, 172 Fed Rep. 840, 'does not purport to say that a word used in the statutes shall have the same meaning wherever used.' And while for certain purposes the provisions of the four codes must be construed as though they had all been passed at the same moment of time, and were parts of the same statute (Sec. 4480 Pol. Code), it is manifest that, dealing as they do with all the subjects of our statutory law, the *prima facie* presumption that a word used more than once in the same statute is always used in the same sense, if it be conceded to apply at all, is necessarily of the slightest weight when considering sections in different codes relating to essentially different matters and subject to different rules of construction. The case of Bruner v. Superior Court, 92 Cal. 239, cannot be taken as holding otherwise, for, as was said by Judge

Gilbert in the Pomona case, *supra,* 'the word *telegraph* has not been defined in either of the codes, as was the word *elisor,*' the word there under consideration, which was clearly defined in section 4192 Political Code. The difference between the telegraph and telephone in respect to matters affecting the question at bar is very pronounced. The telephone being a device by which the human voice is directly transmitted, all that is essential to the sending of a message thereby is the speaking of the same into a comparatively simple appliance connected with the wire along which the current is to go. Trained and skilled operators are necessary only at the central offices for the purpose of answering calls and making the necessary connections of wires. Skilled experts, only, can operate the telegraph, manipulate its instruments, and understand its signals. (See Telegraph Co. v. Nashville, 118 Tenn. 19.) This difference is accountable for the greatest conceivable difference in the extent of the burden on public streets and highways by the use by a telegraph company and a telephone company respectively of such streets and highways for the poles and wires of the system, especially in villages, towns and cities. A telegraph line does no purely local business, but simply runs through a town or city, having therein one or more offices where messages are received and transmitted by trained operators. The result is that its use of public streets for the purposes of its poles and wires is limited to its main through line, and such branches as are essential to connect with its various offices, which are necessarily very few in number. While the telephone is also used for long distance communication, its most common use is for

communication among the people of a particular city or town. Any person being able to use the same in his home, office or place of business, through a simple and inexpensive instrument placed therein and connected by wire with a central agency, the subscribers therefor in a city or town constitute a large proportion of the inhabitants, numbering in a city like Pasadena several thousand. The result is well expressed by the Supreme Court of Tennessee in Telegraph Co. v. Nashville, *supra*, as follows: 'A telephone system, however, to be effective, requires not only rights of way to enter and leave the city, but also to occupy *all* its streets and alleys, and to enter its business houses, residences, and other places, thus making it necessary to use many poles and wires and other fixtures, in order to do the business expected of it. It must therefore, necessarily, make use of the *streets and alleys generally* of the city, and incumber them with a network of wires and poles and fixtures, to a much greater extent than a telegraph system would do.' The italics are ours.

"As we have said, the telephone was unknown at the time of the enactment of section 536 of the Civil Code in the year 1872. While the possibility of transmitting speech along wires had previously been suggested by scientists, no one had ever succeeded in devising a practical instrument therefor until Bell made his discovery in the year 1875. To show that the idea of such transmission of the human voice was up to that time but a dream of scientists, reference need only be made to the 'Telephone Cases,' 126 U. S. Rep. Under these circumstances, our legislature granted the right to construct *lines of telegraph*, with the necessary poles, etc.,

along and upon the public highways of the state. We have seen that this court has expressly recognized that from a strict etymological point of view, telephone lines would not be included in the words 'lines of telegraph,' or telephone corporations, within the words 'telegraph corporations.' We have seen further that the circumstances at that time were such that in its common acceptation the word 'telegraph' must have meant only the kind of communication then known and in practical use under that name, entirely excluding all idea of any such thing as the direct transmission of the human voice, and that by the simple method of speaking into an instrument, of such slight cost that it could be placed in every dwelling house and place of business, with the necessary result that the use of practically all of the streets would be required. It is to be remembered that the question in determining the meaning of the word 'telegraph' contained in this statutory grant is, what was in the minds of the legislators as to its meaning when they used it. No rule of construction applicable to public grants warrants the inclusion therein of privileges not embraced within the common acceptation of the language used. Practically the same question as is here involved was presented to the Supreme Court of the United States in Richmond v. Southern Bell Tel. & Tel. Co., 174 U. S. 761. It was there claimed that the Act of Congress of July 24, 1866, granting to any 'telegraph company' accepting the provisions of the act the right to construct, maintain and operate 'lines of telegraph' over and along military and post roads, etc., applied to telephone companies. After reviewing the decisions that had been ren-

dered by other courts up to that time (1889) the court held that the act was not applicable to such companies. Among other things, the court said: 'It may be that the public policy intended to be promoted by the Act of Congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866, nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When, therefore, the Act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.' The court further said that the conclusion that the act conferred upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress. While it is true, as said by learned counsel

> for plaintiff, that this court is the ultimate tribunal in the matter of the construction of a statute of this state, we are satisfied that the court in that case correctly construed the Act of Congress, and that what is said in the opinion is equally applicable to our section 536 of the Civil Code. A similar question was presented to the Supreme Court of Tennesee in Telegraph Co. v. Nashville, *supra,* a state statute very much like ours being there involved, and a similar conclusion reached. Any other construction would, it appears to us, make this statutory grant include rights and impose burdens on the public that were never within the contemplation of the legislature, and this case is a striking illustration of the wisdom of the rule that requires a grant by the public to be strictly construed in favor of the grantor."

Should this court hesitate to accept as final the foregoing holding of the Supreme Court of California, we call attention to the following authorities and considerations supporting its conclusions:

The construction placed upon the word "telegraph" as contained in section 591 *of the Penal Code in no wise controls the court in construing the same word as used in section 536 of the Civil Code. Because a word or expression as used in one statute is given a certain meaning, it does not follow that the same meaning must be given to it when used in another statute. The same word or*

expression may have different meanings even when used in the same statute.

Endlich on Interpretation of Statutes, Sec. 387;
Rupp v. Swineford, 40 Wis. 28, 31;
L. & N. R. Co. v. Gaines, 3 Fed. 266, 267, 277, 278;
Wood v. Brady, 150 U. S. 18;
Henry v. Trustees, 48 Ohio St. 671, 676;
State v. Knowles, 90 Md. 646, 654;
Wall v. Board of Directors, 145 Cal. 468, 473.

Chief Justice Ryan, in Rupp v. Swineford, *supra,* was of the opinion and so held that the construction of the word "party" as used in one act was not binding upon the court when construing the same word used in another act. As said by him:

> "There surely is no rule of construction requiring the same meaning to be given to the same word, used in different connection in different statutes."

In L. & N. R. Co. v. Gaines, *supra,* it was held, as succinctly stated in the head-ntoes, that:

> "The fact that the constitution of a state uses a word (*e. g.,* the word 'privilege') in one sense in one clause, is no evidence that it is used in the same sense in every other clause; and, were it not used in but one sense throughout the constitution, it would not follow that the legislature used it in the same

sense in statutes subsequently passed. *Even in the same statute a word is often used with distinctly different meanings, the courts giving to it in each instance the meaning which the legislature intended it to have in that particular connection.*" (Italics ours.)

In Wood v. Brady, *supra,* it was held that

"The construction placed by a state court upon one statute implies no obligation on its part to put the same construction upon a different statute, though the language of the two may be similar."

State v. Knowles, *supra,* contains the following statement of the rule:

"It may indeed well be conceded that where a word susceptible of more than one meaning is repeated in the same act, or section of an act (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the same sense; but where the subject-matter to which the word refers is not the same in both clauses, or where the surrounding circumstances are different, this presumption must yield to an adverse presumption, furnished by an analysis of the various purposes of the law, and of the language in which those purposes are expressed."

Wall v. Board of Directors, *supra,* is authoritative of the proposition under consideration. There it was held that the word "employee" as used in one section of an act of the legislature did not include "physicians," while the word "em-

ployees" as used in a subsequent section of the same act did include "physicians," thus expressly recognizing the rule that the same word may be given different meanings though contained in the same act.

The rules of construction properly applicable to the particular statute or expression controls the courts in their interpretations thereof. A previous construction of the same statute or the same expression, arrived at under a different rule of construction, is not binding and will be disregarded.

Blythe v. Ayers, 96 Cal. 532, 590;
Dixon v. Pluns, 98 Cal. 384, 388.

In Blythe v. Ayres, *supra,* it appeared that the Supreme Court of the state in Pina v. Peck, 31 Cal. 359, had arrived at a certain construction of the statute regulating descents and distributions. This same statute subsequent to the time of its construction in this case was incorporated into the codes by section 230 of the Civil Code. It was urged that where the legislature without material alteration enacts a statute which has been judicially expounded by the highest court of the state, it must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old. But it was pointed out that in Pina v. Peck the court had arrived at its

results by the application of the rule of strict construction of statutes in derogation of the common law, while by express provision of the section 230 of the Civil Code a rule of liberal construction obtained, and that, therefore, the court was not bound by the construction placed upon the same statute when considered under a different rule of statutory construction.

The principle laid down in Blythe v. Ayres, *supra,* was followed in Dixon v. Pluns, *supra,* where it was said:

> "It is insisted that the case of Turner v. Tuolumne County Water Co. having been decided under the former practice act and the same provision being carried into the Code of Civil Procedure, this re-enactment carried with it the construction previously given the provision. Such can only be the law where the rules of statutory construction are the same at the date of both enactments. This principle is declared in Blythe v. Ayres, 96 Cal. 591, and also in Flood v. McClure, 32 Pac. Rep. (Idaho) 254."

These cases are direct authority to the proposition to which we will advert that since the court in construing the word *telegraph* in section 591 of the Penal Code in Davis v. Pacific Tel. and Tel. Co., 127 Cal. 312, invoked the rule of liberal construction, the holding of that case is not authority for placing the same construction on the word *telegraph* as used in section 536 of the Civil Code to the construction of which by section 1069 of

the Civil Code an opposite rule is expressly made applicable.

It is obvious that even if all of the many sections of the codes had been enacted at the same time and as parts of the same statute they would not all be subject to the same rules of construction, and words and expressions used in one section would not have the same meaning as the same word or expression used in another section. The court in Davis v. Pacific Tel. & Tel. Co., 127 Cal. 312, in arriving at the construction placed by it on the word *telegraph* as found in section 591 of the Penal Code, invoked the rule of liberal construction established by section 4 of that code. Section 591 of the Penal Code was directed against the malicious destruction of a certain class of property, namely, poles and wires. Applying the rule of liberal construction expressly made applicable, the court was of the opinion that this section was directed against a destruction of *telephone* wires as well as *telegraph* wires. Now, an entirely different situation is presented when the court considers section 536 of the Civil Code. This, as held by the Supreme Court of the state, was the grant from the public of a franchise in all the highways of the state, including the streets of all municipalities,—a grant of incalculable value and importance. In construing such a grant and arriving at its proper scope and effect, a rule of strict construction is applicable. To re-

move all doubt or uncertainty as to the rule by which such a grant must be interpreted, the legislature enacted section 1069 of the Civil Code and thereby unequivocally preserved the rule of *strict construction as to public grants.* This section provides:

> "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, *and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.*"

In speaking of this canon of interpretation, Chief Justice Beatty, in Oakland v. Oakland W. F. Co., 118 Cal. 160, at pages 174-75, after stating the general rule of strict construction, and in referring to certain observances of Mr. Justice Story in his dissenting opinion in Charles River Bridge v. Warren Bridge, 11 Pet. 582, at page 174, said:

> "This is a beautiful theory, but it scarcely accords with the well-known fact that the legislature has but little time to deliberate upon the mass of bills brought before it, and that it is very often imposed upon, and oftener still mistaken as to matters vitally connected with the subjects of legislation. It would seem that all the reasons for protecting the king of England against his own improvidence in granting crown lands would apply with double force to grants by a modern legislature. In recognition of this fact, our own legislature has made it statute law that 'every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.' (Civil Code Sec. 1069.)"

Again the same court has said:

> "The claim now made is therefore to a governmental gratuity, and the statute under which it is advanced—the Act of March 11, 1858,—is to be construed strictly against the pretensions of the claimant; ambiguities therein, if any, are to be resolved against the demand. (Oakland v. Oakland Water Co., 118 Cal. 160.)"
>
> City and County of San Francisco v. Sharp, 125 Cal. 536.

To the same effect are the holdings in

Hostetter v. Los Angeles St. Ry. Co., 108 Cal. 38, 44;

Bartram v. Central Turnpike Co., 25 Cal. 284.

This rule of strict construction of public grants expressly reserved by the Civil Code and recognized and given effect by the courts of this state is in line with the general rule that *grants contained in public statutes are strictly construed in favor of the public. Nothing passes but what is expressly and necessarily included. Whatever is not unequivocally granted is withheld. If a statute relating to the exercise of a franchise or a contract therefor is susceptible of two meanings, the one restricting and the other extending the powers of the grantee, that construction is to be adopted which works the least harm to the state.*

Knoxville Water Co. v. Knoxville, 200 U. S. 22;

Coosaw Mining Co. v. South Carolina, 144 U. S. 550;

Covington and Lexington Turnpike Road v. Sanford, 164 U. S. 578, 588;

Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365;

Vernon Shell Road etc. Co. v. Mayor of Savannah, 22 S. E. 625;

Freeport Water Co. v. Freeport, 180 U. S. 587;

Danville Water Co. v. Danville, 180 U. S. 619;

Rogers Park Water Co. v. Fergus, 180 U. S. 624.

The three last cases above cited involve the construction of certain acts of the legislature of the state of Illinois, and are valuable as showing the extent to which this court goes in resolving an ambiguity in statutes in favor of the public. The dissenting opinion contains a construction of the statutes which may seem warranted by the language used, but the majority of the court held that the statutes were at least ambiguous, and if any ambiguity exists the right of the public must be sustained.

In Covington and Lexington Turnpike Road, *supra,* it is said:

> "It is settled law that in grants by the public, nothing passes merely by implication, and if a contract with a state relating to the

> exercise of franchises, *is susceptible of two meanings, the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the state.*" (Italics ours.)

The established rule is succinctly stated in Knoxville Water Co. v. Knoxville, *supra:*

> "Only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public; *whatever is not unequivocally granted is withheld and nothing passes by implication.*" (Italics ours.)

Coosaw Mining Company v. South Carolina, *supra,* goes directly to the point where one statute appears to unequivocally grant a public privilege, but there is another statute which may be construed to limit it, although not expressly purporting to do so, the latter construction will prevail.

The fact that section 536 of the Civil Code must be given a strict construction in favor of the public sufficiently serves to distinguish the holding of the court in Davis v. Pacific Tel. & Tel. Co., *supra,* and affords a controlling reason why in construing the word *telegraph* as used in section 536 of the Civil Code the court must arrive at an opposite conclusion from that which was reached in construing the same word in section 591 of the Penal Code.

In addition to the rule of strict construction, which has been considered, certain other well established and familiar principles of construction are applicable in determining the scope and effect of section 536 of the Civil Code, the application of which require the holding that *telegraph* as there used did not include *telephone.*

In the construction of statutes, the intent of the legislature is to be given effect. This intent is to be found in the statute itself. Words are to be interpreted according to their meaning at the time of the passage of the statute.

Tynan v. Walker, 35 Cal. 634, 642;
Massey v. Dunlap, 146 Ind. 350, 358;
Sharpe v. Wakefield, 22 Q. B. D. 239, 242;
Board of Works v. United Tel. Co., 13 Q. B. D. 904, 914;
Aerated Bread Co. v. Gregg, L. R. 8, Q. B. 355;
Brown v. Visalia, 141 Cal. 372, 375.

As stated in Tynan v. Walker, *supra:*

> "It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract or add thereto."

In Sharpe v. Wakefield, *supra,* Lord Eshur stated:

> "That the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute."

In Board of Works v. United Tel. Co., *supra,* it was held that the word "street" as used in a certain act of Parliament "must receive the popular meaning existing at the time when the act of Parliament was passed."

The rule above stated is recognized and excellently illustrated by the decision of this court in Brown v. City of Visalia, *supra.* There the court was called upon to determine the effect of certain provisions in the Municipal Corporation Act of 1883 relative to schools and school funds. It was held that the term 'public schools' as therein used did not refer to high schools. As a reason for this holding the court pointed out that the Municipal Corporation Act was passed before any valid legislation was enacted providing for the organization of high school districts and the establishment and maintenance of high schools, and that it could not be said that the legislature, in using in the Municipal Corporation Act the term 'public schools' had in mind high schools when they had no existence in fact.

> "The fact is, however, that the Municipal Corporation Act of 1883, including the sections relied on, *was in existence long before any valid legislation was enacted* (Pol. Code Secs. 1669, 1670, 1671, Stats. 1893) *providing for the organization of high school districts and the establishment and maintenance of high schools, and it can hardly be assumed that such schools were comprehended within the terms 'public schools,' or 'school fund,' as used in the Municipal Corporation Act, when they had no existence in fact.* At the time this Municipal Corporation Act was passed, the legislature, in harmony with constitutional requirement (Art. XIX, Sec. 5), had provided for a system of common schools which embraced only primary and grammar schools, and all existing legislation on the subject had in view solely the establishment and support of such schools." (Italics ours.)

Now, section 536 was incorporated in the Civil Code in 1872. Legislation similar in effect was in existence in this state prior to that time. (Stats. 1850, page 369; Stats. 1857, page 171.) At these dates the telephone was unknown in California. The most fervent imagination could not have foreseen its invention and wonderful development nor that in a comparatively brief period of time the public highways of the state, including the streets of municipalities, would be covered and burdened by a network of telephone poles and telephone wires. At the time the legislation referred to was placed upon the statute books, the nature of telegraphic communication

was well understood. The telegraph was used for the transmission of messages long distances and not for local communication. Because the nature of the telegraph was similar to that of railroads and wagon roads as to the fixed and definite location of lines, the legislature in 1872 incorporated into the Civil Code the requirement that articles of incorporation of any "railroad, wagon road or telegraph organization" must show not only the kind of railroad or telegraph intended to be constructed but the place from and to which it was intended to run and all the intermediate branches thereof and the estimated length of the road or telegraph lines, and a statement that a given percentage of its capital has been paid in. (Sec. 291 Civil Code.) The legislature at the same time, by section 293 of the Civil Code, required that one hundred dollars per mile of telegraph lines be actually subscribed before the filing of the articles of incorporation. These requirements remain unchanged. Telegraph lines, then as now, imposed but a slight burden upon the highways compared with the burden imposed by the construction and operation of a system of telephones.

These considerations and the rules of construction to which reference has been made have led the Supreme Court of the United States and various other courts, following its lead, to the conclusion that statutes purporting to grant rights

in the public highways to *telegraph* companies had no application to *telephone* companies.

City of Richmond v. Southern Bell Tel. and Tel. Co., 174 U. S. 761, 773, 43 Law Ed. 1163, 1167, 1168;

Cumberland T. and T. Co. v. Evansville, 127 Fed. 187;

City of Toleda v. Western Union Tel. Co., 107 Fed. 10;

Sunset Tel. and Tel. Co. v. City of Pomona, 164 Fed. 561, 573-5;

Ib. 172 Fed. 838, Opinion of Judge Gilbert;

Home Telephone Co. v. Mayor etc. Nashville, 101 S. W. (Tenn.) 770.

The Act of Congress of July 24, 1866, known as the Federal Telegraph Act, as the court will remember, grants certain rights to telegraph companies to maintain companies to maintain their lines over any portion of the public domain and over and along any of the military and post roads of the United States. This act was considered in City of Richmond v. Southern Bell Tel. and Tel. Co., 85 Fed. 19, and the judges of the Circuit Court of Appeals for the Fourth Circuit reached the conclusion that "telegraph" as there used included "telephone," and conferred rights upon telephone corporations. This holding was relied upon by the court in Davis v. Pacific Tel. and Tel. Co., 127 Cal. 312, as authority for hold-

ing that the word *telegraph* as used in section 591 of the Penal Code included *telephone*. The case was, however, carried to this court where the holding of the Circuit Court was reversed, and it was authoritatively settled that the Federal Telegraph Act had no application to telephone companies and conferred no rights thereupon. After referring to the holding of the Circuit Court of Appeals that *telegraph* as therein used included *telephone*, it was said:

> "But independently of any question as to the extent of the authority granted to 'telegraph' companies by the Act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, described it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the federal court, was the business transacted by using what is commonly called a 'telephone,' which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company in 1879, as 'an instrument for electrically transmitting or receiving *articulate speech*.'
>
> "It may be that the public policy intended to be promoted by the Act of Congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, con-

gress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. *But the question is, not what congress might have done in* 1866 *nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until* 1876. *Of the different modes now employed to electrically transmit messages between distant points, congress in* 1866 *knew only of the invention then and now popularly called the telegraph. When, therefore, the Act of* 1866, *speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing invention for the purpose of transmitting messages merely by sounds of instruments and by signs or writings.*

"It is not the function of the judiciary, because of discoveries after the Act of 1866, *to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of congress.*

"The conclusion that the Act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of congress upon implication merely; particularly if that

construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions. If congress desires to extend the provisions of the Act of 1866 to companies engaged in the business of electrically transmitting articulate speech—that is, to companies popularly known as telephone companies, and never otherwise designated in common speech—let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it." (Italics ours.)

Home Telegraph Co. v. Mayor etc. of Nashville, *supra,* is a case which we earnestly commend to the careful consideration of the court, not only because of its holding, which is in full accord with the contentions which we are here advancing, but because of the cogent and convincing reasoning contained in the opinion. There, just as here, the telephone company claimed rights in the streets of the city of Nashville under and by virtue of state legislation referred in terms only to *telegraph* corporations. After an exhaustive discussion of the nature of the *telegraph* and *telephone* and a consideration of state legislation dealing with *telegraph* and *telephone* corporations, the court came to the same conclusion as this court did in City of Richmond v. Southern Bell Tel. & Tel. Co., *supra,* namely, that *telegraph* as used in the statute did not include *telephone,* and that such legislation conferred no

rights in the city streets upon *telephone* corporations. In the course of the opinion, it was said:

> *"A telegraph system does not require so many wires, poles and fixtures as does a telephone system. In a city like Nashville a telegraph would require but one or two lines and rights of way for purposes of entrance and exit. It would have but few stations, from which messages would be delivered to the various parts of the city by messengers.*
>
> *"A telephone system, however, to be effective, requires, not only rights of way to enter and leave the city, but also to occupy all its streets and alleys, and to enter its business houses, residences, and other places, thus making it necessary to use many poles, wires and other fixtures, in order to do the business expected of it. It must therefore, necessarily, make use of the streets and alleys generally of the city, and incumber them with a network of wires and poles and fixtures, to a much greater extent than a telegraph system would do.*
>
> *"To the differences already adverted to may be added the greater danger to human life, caused by the network of telephone wires, which are liable to become displaced, broken or defective, and to cross the wires of telegraph and electric light companies, causing death or injury to persons passing along the street, to whom the city owes the duty of protection; also, the increased risk of fires, caused by defective, broken, or crossed wires, caused by their blowing down in storms, and the blocking of the streets by fallen poles and tangled wires. These and other incidents of telephone operations impose on the streets of the city a burden which a telegraph company does not, and from the very nature of things cannot do.*

"When the Act of 1849-50 was passed, telephones were not invented, and when the Act of 1875 was passed the invention had not assumed a practical shape. In its legislation at these dates, with regard to telegraphs, the general assembly did not have in view telephones; and since that date they have in our legislation been recognized as separate matters, closely connected, to be sure, but different in many respects. To illustrate: Our revenue laws tax them separately, and as distinct property, and on a different basis; telegraphs being taxed upon their length of wires, while telephones are taxed on the number of boxes and the population of the city.

"Their modes and apparatus are different. Skilled experts, only, can operate the telegraph; but any child may operate, or assist in operating, the telephone. Only the employes of the telegraph can manipulate its instruments and understand its signals; but all the patrons and the public generally cooperate with the employes of the telephone in its use. The telephone transmits the human voice. The telegraph does not.

"But the complicated, burdensome, dangerous character of its structure and fixtures is the feature of the telephone system which makes it cumbersome upon the streets of the city, and makes it necessary that it should be under the control and supervision of the city, whose duty it is to keep the streets safe and to protect the lives and property of its citizens.

"A telephone company has no more right to occupy the streets under a telegraph charter than a street car company would have under an interurban, or commercial, railroad charter." (Italics ours.)

Suburban Light & Power Co. v. Boston, 153 Mass. 200, although not directly in point, is valuable for the reasoning contained in the opinion. This case, as has been previously indicated, construed certain statutes of Massachusetts purporting to confer rights upon telegraph companies, which statute was subsequently extended to lighting and power companies *so far as applicable.* It was pointed out that in view of the character of lighting and power companies as to their local operations and the burden imposed by their poles and wires in the streets, that it could not be held that the legislature intended in the statute to confer upon these companies any absolute right to use the street. The court was of the opinion that as to such companies, because of these considerations, it was the intention of the legislature to reserve to municipalities the right to determine whether the streets should be occupied by their poles and wires.

A consideration of the various legislations of this state dealing with *telegraph* and *telephone* corporations and with *telegraph* and *telephone* lines and wires demonstrates the unsoundness of appellants' contentions respecting the effect of the holding of the court in Davis v. Pacific Tel. & Tel. Co., *supra,* and shows that the "definition" of *telegraph* as used in Sec. 591 of the Penal Code is not and cannot *be* its definition as used in other sections and presents controlling reasons why a

different construction must now be placed by it upon *telegraph* as used in section 536 of the Civil Code.

In 1901 the legislature revised the state codes and such revisions were held to be unconstitutional through defects in the titles of the several acts affecting such revisions (Lewis v. Dunn, 134 Cal. 291). In its revision of the Civil Code, the legislature amended sections 537, 538, 539 and 540 of the Civil Code by adding thereto the word *telephone; they did not amend section* 536, but left that as applying simply to *telegraph* corporations and *telegraph* lines and wires. In other words, the legislature sought to amend the Civil Code so as to make it unlawful to injure the fixtures, poles or wires of any *telegraph* or *telephone* corporation and to permit *telegraph* and *telephone* corporations to recover damages in certain instances and to provide for the sale and assignment of the franchises of any *telegraph* or *telephone* corporation but expressly refrained from inserting the word *telephone* in section 536 and from conferring any rights thereby upon *telephone* corporations or respecting *telephone* wires. (Stats. 1901, pp. 374-5.) Neither did the legislature at this session, although it amended section 1238 of the Code of Civil Procedure relating to eminent domain in other particulars, provide that this right might be exercised on behalf of *telephone* lines as well as by *telegraph*

lines, but in this respect left it as it had stood since its first enactment, conferring this right simply as to *telegraph* lines. (Stats. 1901, p. 72.)

Again, in 1905, as pointed out by the appellants, the legislature repealed and re-enacted various sections of the code dealing with *telegraph* corporations and made them in terms applicable to *telephone* corporations. The legislature, however, did not thus change sections 291 and 293 of the Civil Code, which sections require that the articles of incorporations of a *telegraph* organization must state the kind of *telegraph* to be constructed, its location and estimated length and require a certain subscription as to each mile of *telegraph* line to be constructed. Neither did it alter section 1017 of the Code of Civil Procedure, which provides for the service of process in civil actions by *telegraph,* nor did it alter in this particular sections 850 and 851 of the Penal Code, authorizing the service of a warrant of arrest by *telegraph.* Now there are just the same reasons why the holding of the court in Davis v. Pacific Tel. & Tel. Co., *supra,* is applicable to the sections last above cited as it is to section 536. Yet in view of the significant omission by the legislature to amend or alter these sections by adding thereto the word *telephone* at a time when it must have had clearly before it the holding of the court in Davis v. Pac. Tel. & Tel. Co. and the distinction between *telegraph* and *telephone,* and in view

of the nature of these provisions no one would have the effrontery to contend that a warrant of arrest could be lawfully served by *telephone*, or that process could lawfully be served thereby nor could it be said that a *telephone* corporation organizing under the laws of this state is required to comply with the provisions of sections 291 and 293 of the Civil Code in preparing their articles of incorporation and state the number of miles of lines to be constructed and the other facts thereby required.

Considering the nature of a telephone system with its network of wires reaching out along every street and byway it would be impracticable to state the number of miles of lines.

Throughout the legislation of this state there runs a clear and marked distinction between *telegraph* and *telephone*. As heretofore pointed out, in 1901 various sections of the codes were amended and sought to be amended by adding the word *telephone*. Nevertheless, section 536 of the Civil Code and certain other sections were not thus amended. This was a significant omission and indicates clearly that the legislature deemed *telegraph* and *telephone* to be separate and distinct. The same is true in regard to the changes made in the codes in 1905. In 1893 (Stats. 1893, p. 288) the legislature passed the first franchise act by which it provided that the franchise to erect or lay *telegraph* or *telephone* wires should be

granted in a certain prescribed manner. In 1897 (Stats. 1897, p. 135), a new franchise act was passed. It dealt with "every franchise or privilege to erect or lay *telegraph*, or *telephone* wires," etc. Such franchises were required to be granted under certain prescribed conditions. The act, however, expressly excepted from the mandatory provisions thereof *telegraph* lines, thus indicating a clear legislative distinction between *telegraph* and *telephone* lines. Later in the same session the legislature, while it must have had before it the distinction between *telegraph* and *telephone*, amended section 1 of the Act of March 23, 1893 (Stats. 1897, p. 176), and provided that every franchise or privilege to erect or lay telegraph or telephone wires, etc., granted by the board of supervisors should be made as prescribed in said act.

To paraphrase the language of this court in the case of the City of Richmond v. Southern Bell Tel. & Tel. Co., *supra*, "it is not the function of the judiciary because of discoveries after the Act of March 21, 1872 (section 536 of the Civil Code), to broaden the provisions of this section so that it will not and could not have been at that time within the contemplation of the legislature." Rather is it for this court to apply to the construction of section 536 the familiar and well-settled rules of statutory construction which we have adverted, the application of which rules to said sec-

tion 536, even though standing alone, will, we believe, impel the court to hold that *telegraph* as therein used did not mean or include *telephone*. When there is added to these considerations the fact that throughout the legislation of this state runs a well defined distinction between *telegraph* and *telephone*, and that the legislature has repeatedly differentiated between the two, the giving effect to this distinction by holding that *telegraph* does not include *telephone* becomes imperative if the court is to avoid overriding the solemn action of a co-ordinate department of the government.

VII.

Section 536 of the Civil Code, as re-enacted in 1905, was repealed, except as to "telegraph or telephone lines doing an interstate business" by the Franchise Act of 1905, commonly known as the Broughton Act. [Statutes 1905, page 777.] The company cannot justify its use of the streets under said section as re-enacted.

This was the conclusion reached herein by Judge Wellborn in the Circuit Court [Tr. 137 and 164 Fed. 561, 578], and by Judge Gilbert in his dissenting opinion in the United States Circuit Court of Appeals [Tr. 359 and 172 Fed. 829, 840]. The correctness of this conclusion was not questioned in the majority opinion in the Court of Appeals.

The legislature at its session of 1905 repealed

title 7 of division 1, part 4 of the Civil Code, which dealt with "telegraph corporations" and re-enacted the title without change, except that in the various sections thereof, including section 536, the word "telephone" was inserted so as to make the provisions of such sections specifically applicable to telephone corporations and telephone lines. This act was approved on March 20th, 1905. No provision was made for its going into immediate effect and therefore under section 323 of the Political Code it would have taken effect had it not been repealed, on the "sixtieth day after its passage."

On March 22nd, 1905, two days after the approval of the act referred to, the Franchise Act of 1905, commonly known as the Broughton Act, was duly approved, and by the provisions of section 11 thereof went into effect immediately.

So far as the Broughton Act was repugnant to and in conflict with the provisions of section 536 of the Civil Code, as re-enacted, it operated as a repeal thereof.

Ex parte Sohncke, 148 Cal. 262.

The holding in the foregoing case is correctly stated in the head notes, as follows:

> "Where two acts are inconsistent, and both are otherwise valid, one previously passed which takes effect sixty days after its passage, is impliedly repealed by an inconsistent act passed one day later, which takes effect immediately."

The question is thus squarely presented whether or not there is such a conflict between the two acts as that the latter effected a partial repeal of the former.

The repugnancy between the two is best seen by setting out together the material provisions thereof. Thus:

> "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutements for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."
>
> Sec. 536, C. C.

> "Every franchise or privilege to erect or lay telegraph or telephone wires—upon any public street or highway—except telegraph or telephone lines doing an interstate business—shall be granted upon the conditions in this act provided and not otherwise."
>
> Broughton Act, Statutes 1905, p. 777.

The Broughton Act is but a re-enactment of earlier franchise legislation of this state, certain of which was before this court in Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176, and in which its general scope and effect was considered. The act (see page 18 hereof) in brief provides for the sale of fran-

chises to the highest bidder after advertisement. An application for a franchise must first be filed with the legislative body. Advertising the sale of a franchise is made discretionary with the legislative body. All bids may be rejected at the discretion of such body. Conditions restricting free competition are forbidden. Any violation of the terms of the act is made a misdemeanor. All acts and parts of acts in conflict with this act are repealed.

Prior to 1905, there was no legislation in this state purporting to extend authority direct from the state to use the public highways for the construction and maintenance of telephone lines. Franchises for such purposes emanated from municipalities and other local subdivisions of the state under general powers.

Ord. No. 30, City of Pomona, Exhibit "A" to Amended Answer [Tr. 95];

Ord. No. 75 of the City of Pasadena [Tr. 320-1];

Ord. No. 1130 of the City of Los Angeles [Tr. 325-7];

Sunset Tel. & Tel. Co. v. City of Pasadena, Vol. 42, Cal. Dec. 593, 595 (see appendix).

Subsequent to 1893, when the first of the franchise acts was passed, such franchises were granted pursuant to these acts.

Horton v. City of Los Angeles, 119 Cal. 602;

Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 53 Law. Ed. 176.

The Broughton Act involved no change in the method of granting franchises for telephone purposes which had prevailed in this state for many years, but together with the acts preceding it, preserved to the various local subdivisions of the state what is essentially a matter of local concern, and which was in accordance with "the long usage in this country for vesting such authority in municipalities."

See:

State *ex rel.* Tel. & Tel. Co. v. City of Spokane, 24 Wash. 53;

Sunset Tel. & Tel. Co. v. City of Pasadena, 42 Cal. Dec. 593, 605 (see appendix).

Whether or not a repeal was effected is essentially a question of legislative intent. The existence for many years of a statutory scheme or policy for the granting of telephone franchises, and the fact that the latest expression of the legislative will was in entire accord and harmony with this settled scheme or policy, furnishes strong ar-

gument against holding that the legislature in 1905, at the same time when it continued such policy by enacting the Broughton Act, intended to overturn and radically change the same in respect to one of its principal objects, viz., the granting of franchises to construct and maintain telephone lines.

Again, the Broughton Act falls within the class of "negative statutes." In substance, it provides that "no franchise or privilege to erect or lay telephone wires shall be granted except to the highest bidder after advertisement." When such a statute is subsequent in time to an affirmative statute, such as section 536 of the Civil Code, the courts will not feel the same reluctance, or experience the same difficulty in holding that the latter repeals the former, as in the case of two affirmative statutes.

Lewis' Sutherland on Statutory Construction (2nd Ed.), Sec. 248.

Also, the Broughton Act is a special statute in the sense that it deals directly and specifically with the subject of franchises for the purposes enumerated in the act. It provides a definite and complete scheme whereby, and whereby only, such franchises may be extended. It is quite inconceivable that the legislature, in passing an act of this character, had in mind that although specific reference is made to "every franchise or privilege to erect or lay telephone wires," neverthe-

less franchises for such purpose were to be withheld from the operation of the act.

The act is entitled "An Act providing for the sale, etc. * * * and *repealing conflicting acts.*" (Italics ours.) Section 11 is as follows:

> "All acts or parts of acts in conflict herewith are hereby repealed; provided, however, that nothing herein contained shall be construed as repealing, or amending the following acts, to-wit: 'An Act relating to the granting by the counties and municipalities of franchises for the construction of paths and roads for the use of bicycles and other horseless vehicles,' approved March twenty-seventh, eighteen hundred ninety-seven; 'An Act to authorize cities and towns to grant franchises for the construction and maintenance of railroads beyond the limits of such cities or towns leading to public parks owned thereby,' being chapter forty of the laws of eighteen hundred and ninety-seven of the state of California."

While general provisions, such as the one just quoted, repealing all conflicting acts, indicate that "the legislature * * * evidently had the question of repeal under consideration and gave expression to the extent of its intention in that regard" (Bank of British North America v. Cahn, 79 Cal. 463, 465), it is apparent from the care taken to save the acts specifically mentioned from repeal that there was in the mind of the legislature the sweeping character of the act, and that it would have the effect of wiping out prior legislation upon the subject with which it dealt.

The various decisions of the State Supreme Court upon the Broughton Act, and the franchise acts preceding it, give to this line of legislation a scope and effect entirely inconsistent with the idea that such act is not repugnant to section 536. Many of these decisions, to which reference will be made, were announced prior to the passage of the Broughton Act and must have been in the mind of the legislature when said act was adopted.

The case of Horton v. City of Los Angeles, 119 Cal. 602, involved the effect of the enactment of the franchise law of 1897 (Statutes 1897, p. 135) upon proceedings started under the Act of 1893, for the sale of a telephone franchise in the city of Los Angeles. No question was raised but that the granting of the telephone franchise was governed by the acts in question.

In People *ex rel.* Dean v. Contra Costa County, 122 Cal. 421, the Supreme Court, in bank, passed upon the Franchise Act of 1893 (Statutes 1893, p. 288), which, like the Broughton Act, provides that:

> *"Every franchise or privilege to erect or lay telegraph or telephone wires,* to construct or operate railroads along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by the board of supervisors, common council, or other governing or legislative body of any county, city and county,

city, town or district within this state, *shall be granted upon the conditions in this act provided, and not otherwise.*" (Italics ours.)

It appeared that the board of supervisors in granting a wharf franchise had followed certain provisions of the Political Code instead of the Act of 1893. The action of the board was sought to be reviewed by *certiorari*. Speaking of the provisions of the Act of 1893, quoted above, it was said at page 422:

> "This language is broad in its terms. It is difficult to imagine language broader in significance and more explicit upon the subject with which the act is dealing. It includes franchises such as is here before us."

Continuing, it was said at page 422:

> "This franchise should have been granted by the board of supervisors under the provisions of the Act of 1893. If the granting of a franchise under the act by the board demands the exercise of judicial functions, then the granting of this franchise in disregard of the provisions of the act is an act performed in excess of judicial power."

Later in the opinion it was said at page 423:

> "A franchise is a special right or privilege granted by the people to an individual, and *under the Act of* 1893 *the grant is based upon valuable considerations.* The legislative character of the grant is the same whether it passes to the individual from the people, *via* the state legislature, or by way of a municipal board of supervisors having the authority vested in it by the state legis-

> lature to make the grant. When legislative power is vested in a municipal board acts done in the exercise of that power are acts of legislation, and should be recognized as such by the courts." (Italics ours.)

While the court concluded that the granting of a franchise was legislative in its character and hence that the action of the board was not reviewable by *certiorari,* the language used in the opinion signifies the view taken by the court of the scope and effect of the Act of 1893.

The Franchise Act of 1897, which is of the same general scope and effect as the Act of 1905, was considered in Pereria v. Wallace, 129 Cal. 397. This was a *mandamus* proceeding to require the trustees of the town of Aetna to grant the plaintiff a franchise to erect and maintain poles and wires for the purpose of furnishing electricity for light and power to the inhabitants of the town. Demand had been made for the same franchise which had previously been granted to another lighting company. *The court was of the opinion that the Act of* 1897 *was in conflict with Sec.* 19 *of article* 11 *of the constitution prior to its amendment in 1911, which section extended a franchise to use the streets for the purpose of supplying water and light of the same general character as the appellee claims is extended by Sec.* 536 *of the Civil Code.* This being true the reverse would obtain, namely, that such

franchise legislation is repugnant to legislation granting a franchise direct from the state.

In City of Los Angeles v. Davidson, 150 Cal. 59, it was held that under the Franchise Act of 1901, as amended by the Act of 1903, it was within the province of the mayor to veto an ordinance granting the franchise and that unless such ordinance was then passed over his veto no franchise was extended.

In McGinnis v. Mayor and Common Council, 153 Cal. 711, in speaking of the Broughton Act, it was said by the court in bank (713):

> *"It is very clear that this act invests the governing or other legislative body of the county, city and county, city, or town, with the sole power to determine, in the exercise of its discretion, whether or not the franchise or privilege petitioned for shall be granted at all,* and the only purpose of the act in this regard is to prevent the granting thereof in any other manner than that prescribed. The presentation of an application to such legislative body does not compel it to proceed to grant the franchise, or to take a single step in the direction of granting it. The legislature has been careful to expressly provide that such body, upon the filing of the application, shall *'in its discretion* advertise,' etc. This, of course, does not mean that the body may in granting such a franchise in its discretion dispense with advertising, but it does undoubtedly mean that it may, in its discretion, *refrain from taking any step toward granting a franchise for the thing asked. In other words, the question whether*

any such franchise shall be given to any one is, notwithstanding the presentation of the application, solely with such legislative body, to be determined by it in its discretion." (Italics in part ours.)

In all the litigation in the state and federal courts involving the effect of the legislation under consideration, the only construction of the Broughton Act suggested by appellee to save section 536 of the Civil Code (construed as the grant of a franchise) from repeal was that the mandatory provisions of the Broughton Act relate only to franchises "proposed to be granted by boards of supervisors," etc. It will be observed that there is no comma before the provision of the act last above quoted. Taking the entire context of the act, and bearing in mind the punctuation, it is obvious that the expression, "hereafter proposed to be granted by boards of supervisors," etc., limits the words "or to exercise any other privilege whatever," and does not limit the franchises for the purposes specifically stated. The construction thus suggested by appellee calls not only for a misreading of section 1 of the act as pointed out, but would serve to emasculate its provisions beyond recognition and place the legislature in the absurb position of enacting a sweeping law upon the subject of granting telephone franchises when the law had no application to such franchises.

We respectfully submit that a consideration of the statutory scheme in respect to the granting of franchises for telephone purposes in this state prior to 1905, the rules of statutory construction applicable to legislation of the character under consideration, and the effect given by the Supreme Court of the state to the Broughton Act, and the various franchise acts of similar purport and effect which preceded it, will bring this court to concur in the conclusion reached in the Circuit Court and by Judge Gilbert in his dissenting opinion in the Court of Appeals.

THE LINES OF THE COMPANY IN POMONA WHICH WERE DESTROYED OR THREATENED BY THE CITY WERE NOT "LINES DOING AN INTERSTATE BUSINESS" WITHIN THE MEANING OF THE EXCEPTION IN THE BROUGHTON ACT.

If this court adopts the conclusion reached by the Circuit Court and by Judge Gilbert in his dissenting opinion in the Court of Appeals, that section 536 as re-enacted in 1905 was repealed by the Broughton Act except as to lines doing an interstate business, the character of the company's lines in Pomona becomes of vital importance.

> "Exceptions must be strictly construed."
> Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 352.

"The proviso to an act is to be read in the light of the subject matter of the act." (Syl.)

People v. Morrill, 26 Cal. 336.

"The office of a proviso is to restrain the *enacting clause;* to except something which would otherwise be within it, or in some manner to modify it; and, where it follows and restricts an enacting clause general in its scope and language it (the proviso) *is to be construed strictly, and limited to objects fairly* within its terms." (Italics ours.)

Southern Bell T. & T. Co. v. D'Alemberte, (Fla.), 21 So. 571, 2.

Although there may be a technical distinction between a proviso and an exception, such distinction is generally disregarded. (U. S. v. Coke, 17 Wall. 168, 21 L. Ed. 538, 540.) The words "except lines doing, etc.," refer to the subject matter of the act, to-wit, "telegraph or telephone *wires.*" In other words, the franchise acts deal with the laying of telegraph or telephone wires and the exception therein withdraws a part of what would otherwise be affected. That is, *lines* must be construed to mean *wires.* This is the precise holding of Southern Bell T. & T. Co. v. D'Alemberte, 21 So. 571.

The burden was on the company to show that its lines were doing an interstate business.

N. Y. *ex rel.* Penn. Ry. Co. v. Knight, 192 U. S. 21.

The evidence of such interstate use was entirely in its possession. To establish such use was of the utmost importance under its theory of the case. It certainly may be presumed that all interstate use was shown.

What does the record show in this respect?

The affidavit of Frank Smith, local agent of the company, discloses that just prior to the severance of the Pomona lines, "a conversation was had over one of said lines from Reno in the state of Nevada with a subscriber of the complainant in the city of Pomona." [Tr. 165.] This is the only interstate conversation shown in the record. Aside from showing this specific conversation, there may be found in the affidavits of Mr. Smith [Tr. 161-7, 186-7] and of Mr. Robinson [Tr. 158-60] general assertions that interstate conversations could be and were had over the Pomona lines of the company. To be sure, there are general statements running through the affidavits filed on behalf of the company to the effect that the company "transmits and delivers by means of its lines, and *telegraph* and *telephone* instruments and apparatus connected therewith, *messages* and *communications* originating at points and places outside of the state of California, and transmitted by and over its lines to points and places within the city of Pomona, and in like manner and by *like means* transmits like *messages* and *communications* originating at

points and places within the city of Pomona to points and places outside the state of California, etc." (Italics ours.) The foregoing quoted statement is taken from the affidavit of H. Keyser, the manager for the county of Los Angeles [Tr. 149-51], and is typical of the general assertions running through the other affidavits filed by appellee. [See Tr. 146, 175.] Even a general allegation that interstate telephonic conversations were had seems to have been studiously avoided. The telegrams to Loucks, Slanker and Ogle, to which reference will be made, would furnish a sufficient basis for such general statements as are made, especially when taken in the light of the labored effort made to establish an interstate telegraphic use of its lines based upon the erroneous theory that the telephoning of a telegraph message received at the central office to a subscriber invested the line from the office to the subscriber with the character of a telegraph line. (Appellee's contention in this regard was afterwards abandoned.) In this connection and as bearing upon the weight to be attached to the evidence offered on behalf of the company respecting the interstate character of its Pomona lines, we call attention briefly to the Ogle, Slanker and Loucks telegrams.

It appears that on the 31st day of August, 1905, when the situation was becoming acute at Pomona, a telegram from Tacoma, Washington,

was delivered to Mr. Ogle, the city marshal of Pomona, purporting to have come over the lines of the company, saying: "I have located Wagner so not necessary to continue search there. John S. Baker." Mr. Ogle states that he does not know any one by the name of John S. Baker, and does not know of any one by the name of Wagner. [Tr. 231, 2.] Again, it appears that on August 22, 1905, a telegram coming over the system of the company was delivered to Mr. Loucks, city attorney of Pomona, from a man of whom Mr. Loucks had never heard. [Tr. 235.] Nor was Mr. Slanker, superintendent of streets at Pomona, overlooked. He, too, on the 29th of August, 1905, was the recipient of an "interstate" telegram from Charles Wilson, purporting to be sent from Reno, Nevada, and asking if John Wilson was working or doing any contracting for him. [Tr. 226.] Mr. Slanker states that he was entirely unacquainted with the purported sender of the telegram, or with any person by the name of John Wilson. We refrain from comment on the significance of these telegrams delivered to the city attorney, city superintendent of streets and city marshal from persons unknown to these city officials and communicated to them after the city's ultimatum of August 11, 1905 [Tr. 21, 123], and within fourteen, seven and five days respectively, prior to the commencement of this action.

The deductions of the Circuit Court with reference to the company's claim to interstate business are here particularly apposite, as follows [Tr. 127-8]:

"Furthermore, while complainant has a telegraph instrument, installed not earlier than 1902, at its central station in Pomona, yet the number of telegraph messages transmitted over its lines to and from Pomona is so inconsiderable as of itself to raise the question, whether or not complainant may be fairly said, from a commercial standpoint, to be engaged in a telegraph business at that point It is true, complainant's affidavits show, that, over all its long distance lines in California, Oregon, Washington and Nevada more than six thousand messages are transmitted each month, and that sixteen per cent of these messages are by telegraph, but they are absolutely silent as to what portion of said sixteen per cent of telegraph messages reach Pomona. In this connection, it is especially important to bear in mind that the burden is on the complainant to establish the telegraph and interstate character of its business (Penn. R. R. Co. v. Knight, 192 U. S. 21, 27), as well as every other ground essential to the equitable relief it seeks, and its failure, while giving with precision other figures showing the interstate and telegraph business over all its lines, to indicate how much of said business was done at Pomona, when the point is vital to its case, and the facts exclusively within its knowledge and easily accessible, is, under elementary rules of evidence, a strong, if not controlling circumstance against the claim, that its business at said place, is, from a commercial point of view, interstate and telegraphic. In this condition of the evidence, general statements, such as some of the affidavits contain, to the effect, that complainant does an interstate and telegraph bus-

iness there, without giving the particulars which the exigencies of complainant's case obviously require, are not only inconclusive, but entitled to but little weight. I am satisfied, from all the information which the record furnishes, that the number of telegraph messages received at and sent from Pomona over complainant's lines are extremely few, while unquestionably the great bulk of its business there is telephone business, and, that there is some ground for respondent's contention, that such interstate messages as have been transmitted were not in the course of commerce, but to establish the possibility of interstate transmission. To hold, under these circumstances, that complainant's telephone lines at Pomona, because of their potential agency in the receipt and delivery of telegraph messages between the central station of complainant and its subscribers, are an integral part of a telegraph system and therefore may be rightfully maintained in the streets of said city without its consent, under said act of congress, would, it seems to me, be a manifest perversion of the statute, and directly in the teeth of the decision of the Supreme Court in Richmond v. Southern Bell Telephone Co., *supra,* and the decision of the Circuit Court of Appeals in Toledo v. Western U. Tel. Co., *supra.* While the interstate clause of the federal constitution should always be reasonably construed so as to promote the beneficent purposes for which it was ordained, it should never be employed as an instrumentality to take from a state its legitimate control over local business."

Again, upon appellee's own showing [see affidavit of Louis Glass, Tr. 168, 9] it had over 130,000 subscribers, of which less than 400 were in Pomona. [Tr. 167.] About 5000 interstate messages per month passed over its lines, of

which 16% were telegraphic. Assuming that the interstate messages were evenly distributed over the entire system, there would be only 15 interstate telephonic conversations a month over the Pomona system, or about one interstate conversation in every two years per subscriber. But naturally the bulk of the interstate conversations occur at points near the state line (at the northern boundary and at the eastern boundary near Reno). Pomona is far removed from the state line. Giving the company the benefit of every inference, it is apparent that the interstate use was a negligible quantity.

It may perhaps be urged that the local lines of the company *may* be connected with its main toll lines, and that its subscribers *may* carry on interstate conversations and that this fact imparts to all the local lines [amounting to two hundred and forty-four miles of wires, Tr. 304] the character of interstate lines and brings them within the meaning of the exception of the Franchise Act. The answer to such contention is found in the language of the exception which applies to "lines (wires) *doing* an interstate business." Obviously under the rule of strict construction applicable, the court will not depart from the plain and unequivocal meaning of the words used and interpret *"doing"* to mean *"which may do."* The legislature when it inserted the exception doubtless had in mind main, long dis-

tance interstate toll lines the burden of which in city streets would be inconsequential in comparison with the burden of the lines of a local telephone system. Certainly it did not intend thereby to afford an easy and convenient means by which a local company might avoid submitting to the lawful and natural requirements of the various local subdivisions of the state by the simple expedient of running a circuit of telephone wires over the state line and thus impress all of its local wires with the character of interstate lines.

In People *ex rel.* Penn. Ry. Co. v. Knight, 192 U. S. 21, it was contended that the local cab service maintained by the Pennsylvania Railway Company in the city of New York was a part of the interstate system of the company, and as such exempt from franchise tax. It appeared that the company maintained a cab stand on its own premises at the Twenty-third street ferry in the city of New York, and that the sole business done by the cabs and coaches maintained by the company was to bring its passengers to and from the ferry, the charges for such service being separate from those of the company for further transportation. As a separate business, the cab service had not been profitable. The contention of the company was denied and the court held that its cab service was no part of its interstate system.

It was said:

> "As shown in the opinion from which we have just quoted, many things have more or less close relations to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

It will be noticed that in this case, the cab service was a mere incident to the company's regular interstate business and afforded an undoubted facility to passengers over its lines, while in the case at issue the interstate facilities offered by the company are a mere incident to its local business, and as a matter of fact are not made use of for interstate conversations. They constitute at most mere potential instruments of interstate communication.

In connection with the consideration of the character of the lines of the company as lines doing an interstate business, it is worthy of note that contentions similar to those here made were advanced in the litigation between the company and the city of Pasadena. (Sunset Tel. & Tel. Co. v. City of Pasadena, Vol. 42 Cal. Dec. 593.

See appendix.) In the opinion of the Supreme Court in the case cited, the findings of the trial court, that the telegraphic business of the company was too insignificant to characterize the lines of the company as telegraph lines, is affirmed. Again, it appears from the opinion in this case (p. 596) that the trial court found that lines of the company in the city of Pasadena were not telephone or telegraph lines doing an interstate business. Although the court pointed out that for the purposes of the case it was immaterial whether they were, or were not, the correctness of the findings was not questioned and the judgment of the lower court was affirmed. This court will take judicial notice of the fact that Pasadena and Pomona are both located in Los Angeles county, and are about equi-distant from the state line.

VIII.

The exception of "telegraph or telephone lines doing an interstate business" contained in the Broughton Act [Statutes 1905, page 777] is not in itself a grant of a franchise to construct and maintain such lines. It is not the function of an exception or proviso to confer power or grant a privilege.

Chicago v. Phoenix Ins. Co., 126 Ill. 276;
Commonwealth v. Hough, 22 Pa. Co. Ct. 440;
Sunset Tel. & Tel. Co. v. City of Pasadena, 42 Cal. Dec. 593 (see appendix).

It is enough here to refer to the decision of the State Supreme Court in Sunset Tel. & Tel. Co. v. City of Pasadena, *supra,* where it was held that this exception in the Broughton Act in itself granted no rights.

Conclusion.

The Supreme Court of the state of California in Sunset Tel. & Tel. Co. v. City of Pasadena, which has been frequently cited herein, has finally determined that the city of Pasadena, and in effect all the larger cities of the state, those having charters framed under the provisions of section 8 of article XI of the constitution, are invested with full control over their streets, so far as their use by telephone lines is concerned. In this case there is presented squarely to the court the question of whether or not the smaller cities of the state, those organized and operating under the provisions of the general laws, are likewise invested with control over their streets in this respect. For the reasons hereinbefore pointed out, we respectfully submit that this court (unless it be of the opinion that the decree of the Circuit Court of Appeals must be reversed for the reason that such court was without jurisdiction) should follow the decision of the Supreme Court of the state as to the effect of section 536 of the Civil Code prior to 1905, and should hold with the Circuit Court and Judge Gilbert of the Court of Ap-

peals that section 536, as re-enacted in 1905, was repealed except as to lines doing an interstate business. The lines of the company destroyed or threatened by the city of Pomona so clearly were local telephone lines and without the category of lines doing an interstate business that this holding would place the smaller municipalities of the state on an equality with the larger cities in respect to their power to control the appropriation of city streets by telephone lines.

Respectfully submitted,

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* APPENDIX.

L. A. No. 2557. In Bank. October 27, 1911.
SUNSET TELEPHONE & TELEGRAPH COMPANY (a Corporation) and THE PACIFIC TELEPHONE & TELEGRAPH COMPANY (a Corporation), Plaintiffs and Appellants, v. CITY OF PAS-
593 ADENA (a Municipal Corporation) et al., Defendants and Respondents.

SYLLABUS.

(1) TELEPHONE CORPORATION — USE OF STREETS OF MUNICIPALITY—FAILURE TO COMPLY WITH ORDINANCE—SUMMARY REMOVAL OF POLES AND WIRES—INJUNCTION—ABSENCE OF GRANT FROM COMPETENT AUTHORITY.—An injunction will not lie to restrain a municipality from summarily removing the poles and wires of a telephone company from its streets, for the failure of the company to comply with the terms of an ordinance making it unlawful to erect or maintain on any of the streets of the city any telegraph or telephone poles or wires for use in "doing local or intrastate business" without first procuring a franchise therefor, and requiring companies, "doing an interstate business" to pay a semi-annual charge of seventy-five cents per pole unless such a franchise is obtained, where such telegraph or telephone company has no grant of right from a competent authority for the use of such streets for its poles and wires.

(2) ID.—AUTHORITY TO USE MUNICIPAL STREETS—ACT PROVIDING FOR SALE OF FRANCHISE IN MUNICIPALITIES—ABSENCE OF GRANT. —The right of a telephone company to exclu-

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*NOTE: (The paging in the report of this case as published in vol. 42 of California Decisions is indicated by stars. Reference in brief is to star pages.)

sively occupy a portion of the streets of a municipality for its poles and wires was not granted by the provision of section 1 of the act of March 22, 1905, to the effect that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or suburban railroads upon any public street or highway, . . . or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, *except steam railroads, and except telegraph or telephone lines doing an interstate business.* . . . shall be granted upon the conditions in this act provided and not otherwise," as the purpose of such act was to prescribe the method and conditions upon which such franchise might be granted, and the only effect of the exception was to exempt the excepted franchises from its operation.

(3) Id.—Engagement in Interstate Business—Right to Use of Streets Not Warranted.—The fact that a telephone company is engaged in an interstate business gives it no right to the exclusive possession of portions of the streets of a municipality, in the absence of permission from the city.

(4) Id.—Grant to Telegraph Corporations—Code Provision—Section Inapplicable to Telephone Corporations Prior to 1905.—The right of a telephone corporation to such an occupation was not conferred by section 536 of the Civil Code prior to its re-enactment in 1905, as until such re-enactment such section was only applicable to telegraph companies.

(5) Id.—Municipal Corporations—Freeholders' Charter—Control of Streets by Municipality—"Municipal Affair"—Charter Provisions Not Subject to General

LAWS.—Where a freeholders' charter confers upon the municipality full control of its streets, with power to determine whether and upon what terms portions thereof may be exclusively used and occupied by telegraph and telephone companies, such control is a "municipal affair," and under the provisions of section 6 of article XI of the constitution, takes precedence over the general laws of the state.

(6) ID. MUNICIPAL CORPORATIONS—TELEPHONE ORDINANCE—FRANCHISE FOR INTRASTATE BUSINESS—TAX FOR INTERSTATE BUSINESS — ORDINANCE NOT DISCRIMINATORY. — The fact that a municipal ordinance imposes a semi-annual charge of seventy-five
594 cents for each pole of a telephone line used in interstate business, and imposes no charge for the poles of lines used in local or intrastate business does not make it discriminatory, where it is provided that exemption from payment of the charge may be had by obtaining a franchise.

(7) ID.—DEED—CONSTRUCTION OF PUBLIC GRANTS.—Grants contained in public statutes or made by public officers or public bodies are to be strictly construed in favor of the public.

(8) ID.—STATUTORY CONSTRUCTION—MEANING OF WORD—USE IN DIFFERENT PLACES IN STATUTE.—There is no rule of law that necessarily requires the same meaning to be given to the same word used in different places in the same statute.

(9) ID.—ID.—USE OF WORD "TELEGRAPH"—STATUTE GRANTING RIGHTS IN PUBLIC HIGHWAYS — "TELEPHONE" NOT INCLUDED. — The word "telegraph" does not include the word "telephone" when used in a statute granting telegraph companies the right to use public highways.

Appeals from the Superior Court of Los Angeles county—Walter Bordwell, judge.

For Appellants—Pillsbury, Madison & Sutro; E. S. Pillsbury, Alfred Sutro, of counsel.

For Respondents—J. P. Wood, city attorney; Wm. J. Carr, assistant city attorney; John W. Shenk, city attorney for city of Los Angeles, brief by permission of court; Percy V. Long, city attorney, Jesse H. Steinhart, assistant city attorney, for city and county of San Francisco, by permission of court.

OPINION.

These are appeals from an order dissolving a temporary injunction, and from a judgment denying an injunction and an order denying a motion for a new trial in an action brought by plaintiffs against the city of Pasadena and certain officers of said city to obtain a decree restraining the defendants from in any manner interfering with the maintenance or operation of plaintiffs' telephone and telegraph system so far as the same is located on public streets in said city.

There is no conflict in the evidence as to what we consider the material facts in this case. Some of our statements in regard thereto are taken from the opinion of the trial court. The city of Pasadena was organized in the year 1886 under the general laws of the state as a city of the sixth class, and in the year 1901 reorganized under a freeholders' charter, pursuant to the provisions of the constitution. Prior to its organization as a city in 1886, viz., in the year 1883, the Sunset Telephone-Telegraph Company established a telephone system therein, using the roads and streets thereof for its poles and wires. Plaintiff Sunset Telephone & Telegraph Company was incorporated in April, 1889, and immediately acquired by assignment all of the property of the Sunset Telephone-Telegraph Company, including its lines in Pasadena, and whatever rights it had acquired in that city. The other plaintiff, the Pacific etc. Company, was incorpor-

ated in 1906, and is the lessee of its co-plaintiff of its entire telephone and telegraph system. The interests of the two plaintiffs in the matters involved are so close that they may be here treated as one person, and for convenience will be so treated and referred to in the singular number. As originally installed there was a local exchange and long distance connections. "The sys-
595 tem has been extended, and has now about 4000 regular subscribers. Throughout the state of California, and in its various cities and towns, the said plaintiff has installed a similar system for both local and long distance use, serving its subscribers with about 195,000 telephones. It has likewise installed in the states of Oregon, Washington, Montana, Idaho and Nevada, a system for local and long distance service, having in those states an aggregate of about 135,000 telephones for its subscribers. The entire system in California and the other states is connected, forming a homogeneous whole." It may be assumed for the purposes of this case that plaintiff's lines in Pasadena have always been used in the conduct of an interstate telephone business. Although plaintiff's charter describes it as a telephone *and* telegraph company, it is clear that it has always been primarily and principally engaged in purely a "telephone" as distinguished from a "telegraph" business, and that while it has occasionally telegraphed some messages over its main telephone wires, such transmission of messages, to use the language of the finding of the trial court, "is not usual or customary, and the number of them transmitted is insignificant, and too insignificant to characterize the lines of plaintiffs or any of the lines of either of plaintiffs, situated in the city of Pasadena, as telegraph lines." Of course, its lines connecting its offices or exchanges with the houses and places of business of its subscribers, constituting the great

bulk of its system in the city of Pasadena, have never been used at all for the transmission of telegraphic messages. The trial court found that until the year 1901, neither of plaintiffs transmitted any telegraph messages at all, over or by the aid or use of lines situated in the city of Pasadena, and that their lines situated in said city were not used at all for telegraphic purposes, and that the only lines or wires of plaintiff over which any telegraph messages have been or are at any time transmitted are telephone wires, used usually for telephone purposes, placed upon poles running on Fair Oaks avenue south of Colorado street to the south limits of said city. The findings of the trial court in this connection are sufficiently sustained by the evidence. It is manifest from the record that what plaintiff is seeking is to restrain action on the part of the local authorities in regard to a "telephone" as distinguished from a "telegraph" system.

On August 6, 1887, an ordinance was adopted by the board of trustees of the city on the application of the Sunset Telephone-Telegraph Company, being ordinance No. 75, entitled "An ordinance granting to the Sunset Telephone-Telegraph Company, the right to erect poles and run telephone wires along the public streets." This ordinance purported to grant to the applicant the privilege for the period of twenty years from its date to erect and maintain telephone poles upon, and to run wires over and along the public highways and thoroughfares of the city of Pasadena, subject to certain conditions. These conditions reserved to the board of trustees of the city certain supervision and control in the matter of the location, construction and maintenance of the poles and wires for the purpose of preventing undue interference with the use of the streets by the public. After the expiration of the term prescribed by this ordinance, viz., on February 4,

1908, there was duly enacted an ordinance
596 known as ordinance No. 841, providing that it shall be unlawful to erect or maintain on any of the streets of the city any telegraph or telephone poles or wires for use in "doing local or intrastate business without a franchise or privilege therefor from the city of Pasadena," and that any person, etc., maintaining or operating upon the streets any telegraph or telephone lines or poles "doing an interstate business" shall pay to the city, semi-annually in advance, "for the use of the streets, alleys, and public places by the poles, wires and appliances of such lines," the sum of seventy-five cents for each and every pole so maintained and operated, unless such person, etc., shall "have or secure a franchise or privilege" therefor. Poles and wires maintained in violation of the provisions of this ordinance are declared thereby to be public nuisances, and it is made the duty of certain officers of the city to summarily abate and remove any poles, wires or appliances so maintained. Plaintiff having failed to apply for or secure from the city any franchise for the use of the streets for its poles and wires, and having refused to pay any of the charges imposed by the ordinance for the use of the streets for its poles and wires, the city authorities were proceeding with the work of summarily removing such poles and wires from the streets, with the result that this action was commenced to obtain an injunction restraining any such action by the city authorities, the claim of plaintiff being that as to it ordinance 841 is void and without force.

It is to be borne in mind that the only interference with plaintiff threatened by the city authorities is that of preventing the exclusive occupation by it with poles and wires of portions of the public streets of the city except upon compliance with the terms of the ordinance. To war-

rant such exclusive use of any portion of a public highway by any person or corporation, there must be, as was said by the trial judge, a "grant of right from a competent authority."

It was claimed by plaintiff in the lower court that such a grant was to be found in the provisions of the act of congress of July 24, 1866, entitled, "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal and military purposes," the plaintiff being a telegraph as well as a telephone company and having accepted the provisions of said act in the year 1897. For all the purposes of this appeal, this claim has been expressly abandoned by plaintiff. It may properly be noted, in passing, that such a claim is without force under the views expressed in the recent case of *Western Union Telegraph Co. v. Hopkins*, 41 Cal. Dec. 640.

Plaintiff relies upon the claim that all its lines in Pasadena are interstate telephone and telegraph lines doing an interstate telephone and telegraph business, as giving it the right to occupy the public streets thereof without permission of the city. We may assume purely for the purposes of this decision, that the claim of the plaintiff as to the interstate character of its business in Pasadena is sustained by the evidence, although the trial court found otherwise. It is, of course, not claimed and could not well be claimed that the mere fact that one is engaged in interstate
507 commerce gives him the right to permanently occupy, to the exclusion of the public, portions of public highways of a state, either within or without cities, in the absence of permission to do so from proper state authority. (2) But it is argued that the right has been granted to plaintiff by the state by section 1 of the act of the legislature of the state of California, approved March 22nd, 1905, entitled, "An act

providing for the sale of street railroad and other franchises in counties and municipalities," etc. (Stats. 1905, p. 777.) That section, so far as material simply provides that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or suburban railroads upon any public street or highway, . . . or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies or any county, city and county, city or town within this state, *except steam railroads and except telegraph or telephone lines, doing an interstate business,* . . . shall be granted upon the conditions in this act provided, and not otherwise." The remaining sections prescribe the method of procedure to be followed and the conditions upon which the franchises specified shall be granted, such conditions including among others one to the effect that the holder must, after the first five years of the life of the franchise, pay to the county or municipality two per cent of the gross annual receipts, arising from the use, operation or possession of the franchise. It appears very clear to us that this act cannot reasonably be construed as *granting* any right in public highways. Its whole purpose was to prescribe the method and conditions upon which the franchises included within its terms *might be* granted by the legislative body authorized by law to make the grant, or as said in *McGinnis v. Mayor etc.*, 153 Cal. 711, "to prevent the granting thereof in any other manner than that prescribed," and the only effect of the exception was to exempt the excepted franchises from the operation of the act. (3) So that assuming that plaintiffs' claim as to the interstate character of its business in Pasadena is correct, that fact alone gives it no right to ex-

clusive possession of portions of the public highways in the city. And it may be said in passing that we cannot see that the question whether this claim be well founded or not is at all material in the determination of this case, unless it be also true that ordinance No. 841 discriminates against those engaged in interstate telephone or telegraph business, a matter to which we shall hereafter refer.

Plaintiff's claim of right to use the streets of Pasadena for its poles and wires without permission from the city is based principally upon section 536 of the Civil Code, providing ever since its reenactment in 1905 that "telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the
598 road or highway or interrupt the navigation of the waters." Prior to its reenactment in 1905 this section did not in express terms include telephone corporations or telephone lines, and it is very earnestly argued by defendants and was held by the learned trial judge that until such reenactment the section was not applicable to telephone corporations or lines.

Section 536, Civil Code, was a part of the original Civil Code, adopted in 1872, and was never changed or amended in any respect until its repeal and reenactment in the year 1905. As we have already stated, until the year 1905, it contained no reference in terms to telephone corporations, reading "Telegraph corporations may construct lines of telegraph along and upon," etc. In the recent case of *Western Union Telegraph Co. v. Hopkins*, 41 Cal. Dec. 640, we considered the ef-

fect of this section, so far as telegraph corporations are concerned. It was there concluded that the section is operative to effect a grant to all telegraph corporations so far as acceptance of its provisions by construction and maintenance of its lines in public highways is had, in the absence of later enactment having the effect of repealing the same or suspending its operation as to particular portions of the state, and that in so far as such acceptance is had prior to any such repeal or suspension, and to the extent of the actual occupation by any corporation of public streets constituting such acceptance, a vested right accrues to the corporation, subject only to the lawful exercise of the police power, of which it cannot be deprived at the instance of the state without compensation. This, as his opinion indicates, was the view of the learned judge of the trial court in this case.

This construction makes the section a pure grant by the state of a franchise in its highways, one, as suggested by defendants, "of incalculable value and importance." (7) It is a well settled principle that grants contained in public statutes or made by public officers or public bodies are to be strictly construed in favor of the public, the rule being clearly stated in *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 33, as follows: "Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by implication." This rule of construction of public grants has been incorporated in our Civil Code, section 1069 of the Civil Code providing: "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, *and every grant by a public officer*

or body, as such, to a private party, is to be interpreted in favor of the grantor." The italics are, of course, ours. (See opinion of Chief Justice Beatty in *Oakland v. Oakland Water Front Co.*, 118 Cal. 174 and 175, and *Clark v. City of Los Angeles*, decided May 31, 1911, 41 Cal. Dec. 389.) It is urged by learned counsel that this rule has no application to the question in dispute here, going only to the question of the *extent* of a valid grant and in no way to the *identity* of the grantee, and the language, "but this rule presupposes the existence of an effective grant, and relates only to the extent of its operations," used by this court in *Cullen v. Sprigg*, 83 Cal. 599 56, is quoted in support of this claim. This was said in disposing of a claim that section 1069, Civil Code, was applicable in determining the question whether a grant to a private party was void for uncertainty, and was immediately followed by the statement: "In all cases it must be presumed that a grantor intended to make a valid grant of some property unless the contrary appears." Assuming, in favor of plaintiff, that the rule goes only to the question of the extent of a valid grant, it appears to us that such a question is necessarily presented here. The thing granted, as described in the statute, was the right to "construct *lines of telegraph* along and upon any public road or highway," etc., and in such places to "erect poles," etc., "for supporting the insulators, wires and other necessary fixtures of their lines," i. e. the lines of a *telegraph* system. Whether or not this description included the poles and wires of a telephone system is a question very materially affecting the extent of the grant made by the state and the consequent burden imposed on public streets and highways. We can see no good reason why the rule of strict construction in favor of the public is not applica-

ble to this section, which is purely a grant by the state of valuable rights.

In view of this rule, we are satisfied that the decision in *Davis v. Pacific Tel. & Tel. Co.*, 127 Cal. 312, cannot be taken as definitely settling the meaning of the word "telegraph," as the same is used in section 536 of the Civil Code. The question there was whether the words "any line of telegraph" as used in section 591, Penal Code, as it existed prior to the year 1905, included a telephone line. The section made it a misdemeanor for any one to maliciously take down, remove, injure or obstruct "any line of telegraph," or to sever any wire thereof. After showing that in numerous cases in other jurisdictions the courts had held that "telephone" is included within the meaning of "telegraph," the court said that "if the consideration could be limited to a strict etymological point of view, it would have to be conceded at once that there is a difference in the meaning of the two words, the one conveying the idea of transmission of writing to a distance, the other the transmission of sound to a distance." But it was declared that in their "present sense and acceptation" the term "telegraph" means "any appartus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word 'telephone'." It was held that in contemplation of section 4 of the Penal Code, which provides that the rule of the common law that penal statutes are to be strictly construed has no application to the code, and that "all its provisions are to be construed according to the fair import of their terms with a view to effect its object and to promote justice," and in recognition of the fact that a substantial identity exists between the two words, no hesitation need be expressed in declaring that under section 591 of the Penal Code a

criminal prosecution will lie for the illegal destruction of a telephone wire.

When we consider the rules applicable in the construction of public grants, it seems at once apparent, in view of the fact that the telephone was absolutely unknown at the time of the enactment of section 536, Civil Code, that the
600 decision in *Davis v. Pacific Tel. & Tel. Co., supra,* is not controlling here. (8) There is no rule of law that necessarily requires the same meaning to be given to the same word used in different places in the same statute. It is plain that section 4480 of the Political Code, as was said by Judge Gilbert in his dissenting opinion in *Sunset Tel. & Tel. Co. v. Pomona,* 172 Fed. Rep 840, "does not purport to say that a word used in the statutes shall have the same meaning wherever used." And while for certain purposes, the provisions of the four codes must be construed as though they had all been passed at the same moment of time, and were parts of the same statute (sec. 4480 Pol. Code.), it is manifest that, dealing as they do with all the subjects of our statutory law, the *prima facie* presumption that a word used more than once in the same statute is always used in the same sense, if it be conceded to apply at all, is necessarily of the slightest weight when considering sections in different codes relating to essentially different matters and subject to different rules of construction. The case of *Bruner v. Superior Court,* 92 Cal. 239, cannot be taken as holding otherwise, for, as was said by Judge Gilbert in the Pomona case, *supra,* "the word *telegraph* has not been defined in either of the codes, as was the word *elisor,*" the word there under consideration, which was clearly defined in section 4102, Political Code. The difference between the telegraph and telephone in respect to matters affecting the question at bar

is very pronounced. The telephone being a device by which the human voice is directly transmitted, all that is essential to the sending of a message thereby is the speaking of the same into a comparatively simple appliance connected with the wire along which the current is to go. Trained and skilled operators are necessary only at the central offices for the purpose of answering calls and making the necessary connections of wires. Skilled experts, only, can operate the telegraph, manipulate its instruments, and understand its signals. (See *Telegraph Co. v. Nashville*, 118 Tenn. 19.) This difference is accountable for the greatest conceivable difference in the extent of the burden on public streets and highways by the use by a telegraph company and a telephone company respectively of such streets and highways for the poles and wires of the system, especially in villages, towns and cities. A telegraph line does no purely local business, but simply runs through a town or city, having therein one or more offices where messages are received and transmitted by trained operators. The result is that its use of public streets for the purposes of its poles and wires is limited to its main through line, and such branches as are essential to connect with its various offices, which are necessarily very few in number. While the telephone is also used for long distance communication, its most common use is for communication among the people of a particular city or town. Any person being able to use the same in his home, office or place of business, through a simple and inexpensive instrument placed therein and connected by wire with a central agency, the subscribers therefor in a city or town constitute a large proportion of the inhabitants, numbering in a city like Pasadena several thousand. The result is well expressed by the Supreme Court of Tennessee in

601 *Telegraph Co. v. Nashville, supra,* as follows: "A telephone system, however, to be effective requires, not only rights of way to enter and leave the city, but also to occupy *all* its streets and alleys and to enter its business houses, residences, and other places, thus making it necessary to use many poles and wires and other fixtures, in order to do the business expected of it. It must therefore, necessarily, make use of the *streets and alleys generally* of the city, and incumber them with a network of wires and poles and fixtures, to a much greater extent than a telegraph system would do." The italics are ours.

As we have said, the telephone was unknown at the time of the enactment of section 536 of the Civil Code in the year 1872. While the possibility of transmitting speech along wires had previously been suggested by scientists, no one had ever succeeded in devising a practical instrument therefor until Bell made his discovery in the year 1875. To show that the idea of such transmission of the human voice was up to that time but a dream of scientists, reference need only be made to the "Telephone Cases," 126 U. S. Rep. Under these circumstances our legislature granted the right to construct *lines of telegraph,* with the necessary poles, etc., along and upon the public highways of the state. We have seen that this court has expressly recognized that from a strict etymological point of view, telephone lines would not be included in the words "lines of telegraph," or telephone corporations, within the words "telegraph corporations." We have seen further that the circumstances at that time were such that in its common acceptation the word "telegraph" must have meant only the kind of communication then known and in practical use under that name, entirely excluding all idea of any such thing as the direct transmission of the human voice, and

that by the simple method of speaking into an instrument of such slight cost that it could be placed in every dwelling house and place of business, with the necessary result that the use of practically all of the streets would be required. It is to be remembered that the question in determining the meaning of the word "telegraph" contained in this statutory grant is, what was in the minds of the legislators as to its meaning when they used it. No rule of construciton applicable to public grants warrants the inclusion therein of privileges not embraced within the common acceptation of the language used. Practically the same question as is here involved was presented to the Supreme Court of the United States in *Richmond v. Southern Bell Tel. & Tel. Co.*, 174 U. S. 761. It was there claimed that the act of congress of July 24, 1866, granting to any "telegraph company" accepting the provisions of the act the right to construct, maintain and operate "lines of telegraph" over and along military and post roads, etc., applied to telephone companies. After reviewing the decisions that had been rendered by other courts up to that time (1889), the court held that the act was not applicable to such companies. Among other things the court said: "It may be that the public policy intended to be promoted by the act of congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, congress would have embraced in its provisions companies employ-
602 ing instruments for electrically transmitting articulate speech. But the question is, not what congress might have done in 1866, nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any

device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, congress in 1866 knew only of the invention then and now popularily called the telegraph. When therefore the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings." The court further said that the conclusion that the act conferred upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by congress. While it is true, as said by learned counsel for plaintiff, that this court is the ultimate tribunal in the matter of the construction of a statute of this state, we are satisfied that the court in that case correctly construed the act of congress, and that what is said in the opinion is equally applicable to our section 536 of the Civil Code. A similar question was presented to the Supreme Court of Tennessee, in *Telegraph Co. v. Nashville, supra*, a state statute very much like ours being there involved, and a similar conclusion reached. Any other construction would, it appears to us, make this statutory grant include rights and impose burdens on the public that were never within the contemplation of the legislature, and this case is a striking illustration of the wisdom of the rule that requires a grant by the public to be strictly construed in favor of the grantor.

(9) We have examined the many cases cited by plaintiff, wherein it is held that the word "tele-

graph" in a statute includes "telephone." Comparatively few of these cases involve any question of the right of a telephone company to use public streets and highways under a statutory grant to telegraph companies, being generally, as our own Davis case, cases in which the meaning of the word as used in some other statute was involved. For instance, the question whether a telephone company could incorporate under a statute authorizing the incorporation of telegraph companies, the question whether such a company had the right of eminent domain under a statute giving telegraph companies such right, the question whether telephone companies were under the burdens and obligations imposed on telegraph companies, the question whether a statute providing for the assessment of telegraph companies applied to telephone companies, were questions presented in many of the cases. But there are some cases cited in which statutes giving telegraph companies rights and privileges in public highways were held to include telephone companies. In none of these cases, however, does the question of the effect of the rule requiring grants by the public to be strictly construed in favor of the grantor appear to have been discussed. In so far as these decisions may appear, upon a close examination of the condition of the statutory law upon which they are based to be opposed to the conclusion we have reached, we are of the opinion that they should not be followed in this state.

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(4) We are thus brought to the conclusion that prior to its repeal and re-enactment in the year 1905, section 536 of the Civil Code was not applicable to telephone companies.

In the year 1901 the city of Pasadena became organized under a freeholders' charter, adopted under the provisions of section 8 of article XI of the constitution of the state, and has ever since

continued as a city under such charter. (Stats. 1901, p. 884, *et seq.*) In the year 1896, section 6 of article XI of the constitution was so amended as to make the provisions of a freeholders' charter so adopted paramount to general laws enacted by the state legislature "in municipal affairs." The charter above referred to purports to confer upon the city of Pasadena full control of its streets, with power to determine whether and upon what terms portions thereof may be exclusively used and occupied by telegraph or telephone companies. By subdivision 13 of section 3 of article I, the city is declared to have the power to lay out, open, extend, widen, change, vacate and improve streets; by subdivision 7 of section 10 of article VIII the city council is declared to have not only the power to require the placing underground of all telephone, telegraph and other wires, but also the power to "prohibit the placing of poles and the suspending of wires along or across any of the streets, alleys and public places of the city;" by subdivision 31 of the same section the city council is declared to have the power "to *grant* the right to *erect or lay telegraph or telephone wires*, to construct and operate street railroads, to lay gas or water pipes, to erect poles and wires, or lay conduits for transmitting electric energy for lighting or power purposes *along or upon the public streets and highways of the city;* provided, however, that all such rights and franchises shall be granted subject to all the restrictions and limitations in this charter contained relating to the granting of franchises." The italics are ours. By section 3 of article XIII, as amended in February, 1905, the terms for which any franchise may be granted was limited to twenty years, and the city council was authorized to impose such lawful conditions, restrictions and limitations as may best subserve the public interest and welfare. We are satisfied that these provisions can

reasonably be read in no other way than as evidencing an intention to give to the city of Pasadena full control of its streets and highways with the power to determine for itself whether any portion thereof shall be exclusively used and occupied by the poles and wires of telegraph, telephone or power companies. It cannot be disputed in the light of the decisions that the state may surrender to any municipality full control of its streets and highways in regard to such matters, and, of course, an appropriate place for an enactment of this character on the part of the state is, under our constitutional provisions, the freeholders' charter provided for by section 8, article XI. (See *Platt v. City and County of San Francisco*, 158 Cal. 74, 82, *et seq.*) That the provisions of the charter purporting to give such full control as to the use of streets for pipes
604 and conduits for the furnishing of water and light are not effective, in view of the direct grant for those purposes made by section 19 of article XI of the constitution (see *In re Johnston*, 137 Cal. 115), is not a sufficient warrant for holding that it was not intended to vest such control in the city. We think it impossible to reasonably construe these provisions as purporting to authorize on the part of the city only such regulations as come within the domain of the police power.

Are the matters referred to "municipal affairs" within the meaning of those words as they are used in section 6 of article XI of the constitution? There has been much discussion in our decisions as to what matters are embraced in this term, and it has been said that it is very difficult, if not impossible, to give a general definition clearly defining the term "municipal affairs" and its scope. But we can see very little reason in the argument that the question whether and to what extent the streets of a municipality shall be sub-

jected to such secondary uses as the maintenance therein of telegraph and telephone poles and wires, the primary purpose for which highways are established being the convenience of public travel, and such secondary uses permanently excluding the public from using for such purpose the portions occupied for such uses, is not a municipal affair. If the provisions of not only the many freeholders' charters of this state but also those of the general municipal corporation act and other statutes are to be given any effect in the consideration of this question, they demonstrate the existence of practically a universal idea that such matters are principally of local concern, and should be within the exclusive control of the municipality. Even in the case of the ordinary commercial railroad, we find legislative recognition of the fact that the question whether such a railroad should be allowed to occupy for its tracks any street, alley or highway within a municipality is one of such concern to the municipality that its consent should be a prerequisite, it being provided in section 470 of the Civil Code, as enacted in 1872, that "no railroad corporation must use any street, alley or highway . . . within any incorporated city or town, unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate." As said by learned counsel for defendants, "the legislature has consistently recognized and treated the control of municipal streets by municipalities as a local or municipal affair as distinguished from a state affair." It is unquestioned that the matter of opening, widening and vacating the streets of a municipality is purely a municipal affair. (See *Byrne v. Drain*, 127 Cal. 663, 667.) It would seem to be equally true that the question to what extent and upon what terms the primary use of

these streets, which are constructed and maintained by the people of the city for use in common by the public for purposes of travel, shall be subjected to secondary uses completely excluding any use at all by the traveling public of the portions devoted to such secondary uses, is also a municipal affair, within the meaning of our constitutional provision. It is simply a question of the extent to which streets constructed and maintained by the city primarily for purposes of travel by the public shall be diverted to other uses excluding such primary use as to the portions so diverted, an absolute taking away from the city and its inhabitants of so much of the streets as is exclusively used for poles and wires.

605

In holding that a statute of the state of Washington made the consent of the city council of a municipality prerequisite to such use of the streets for telegraph and telephone lines, the Supreme Court of that state said: "In addition to the reasons suggested heretofore for imposing the powers and duties upon municipalities to control the streets, it is pertinent to refer to the long usage in this country for vesting such authority in municipalities. Such usage is distorical, and is expressed in many statutes in the different states and in the mother country. The people of a municipality, who incur and pay the expenses for the construction and maintenance of their streets, and who largely use them, are usually most capable of exercising discretion in the secondary and subordinate purposes for which their streets shall be used." (*State ex rel. Telephone & Telegraph Co. v. City of Spokane*, 24 Wash. 53.) In the face of the long usage in such matters, by virtue of which this power has so frequently been regarded as one appropriate for a municipality to possess, it would be difficult to find warrant for the conclusion that although such power is in

terms conferred by a charter, it is nevertheless not a municipal affair within the meaning of our constitution. That any citizen in the state may be interested in the maintenance and operation of a telephone system in the city of Pasadena, to the extent that he may desire "the quick and ready communication afforded by the telephone" with some resident thereof, is doubtless true, but we do not see that this affects the question whether the extent to which portions of the streets of Pasadena may be exclusively occupied by telegraph and telephone companies is a municipal affair. It may, however, be suggested that no persons can be more interested in having the quickest and most efficient method of communication available between Pasadena and the rest of the state than the people of Pasadena themselves, and it is not likely that any municipality will insist upon such arbitrary and unreasonable conditions in the matter of the use of its streets, as will result in cutting it off from such method of communication.

(5) The matters referred to being "municipal affairs" within the meaning of our constitutional provision, the charter provisions vesting control in the city of Pasadena are not subject to general laws, and the re-enactment of section 536 of the Civil Code in 1905, by which certain rights in public highways were granted to telephone companies, conferred no right upon plaintiff so far as the streets of Pasadena are concerned.

(1) It follows that plaintiff has no effectual "grant of right from a competent authority" for the use of the streets of the city of Pasadena for its poles and wires.

(6) The ordinance is not open to the objection that it discriminates against lines doing an interstate business, in that it imposes a semi-annual charge of seventy-five cents for each pole

of a line used in interstate business, and
606 imposes no such charge for the poles of
lines used in local or intrastate business.
The discrimination, if any, is one entirely in favor of the interstate line. As to lines doing a local or intrastate business the requirement of the ordinance is absolute that such use of the streets cannot be had without a franchise therefor from the city of Pasadena. As to lines doing an interstate business it is recognized that a franchise may also be obtained from the city and it is expressly provided that if such person or corporation have or secure such franchise, it shall not be required to pay the amounts required by the ordinance during the life of the franchise. The requirement as to such lines is simply that either a franchise must be obtained for the use of the streets, as required for intrastate and local lines, or the charge imposed by the ordinance must be paid. In other words, no franchise need be procured for such use for interstate lines, but the streets may be used for such lines without any grant by the city, provided the required charge be paid. At the same time, the owners of an interstate line, if they elect, may obtain such a franchise therefor just as and presumably on as favorable terms as the owners of intrastate and local lines may obtain their franchise, and thus exempt themselves from the payment of any such charge as is imposed by the ordinance. It is obvious, therefore, that there is no discrimination against interstate lines.

There is no question in this case of any actual discrimination against interstate companies in the enforcement of the ordinance, and the ordinance, so far as any attempt at discrimination is concerned, is fair on its face. It is of course needless to say that such a discrimination would not be allowable.

We are satisfied, in view of what has been said as to the power of the municipality in such matters, that no question is here involved as to the reasonableness of the amount of the semi-annual charge made by the ordinance. The city of Pasadena having the power to withhold from telephone companies the right to exclusively occupy portions of its streets for poles and wires, or to permit such occupation on such terms as are satisfactory to it, we have, as suggested by the trial judge, no question whether or not the amount charged is a reasonable charge. As said by him, "If it be competent for the city to exclude the poles and wires of a telephone company from its streets (and for reasons here given it must be so held), then, clearly, it is competent for the city to name such terms and require the payment of such compensation as seems proper."

Our conclusions upon the matters we have discussed require an affirmance of the action of the trial court.

The judgment and orders appealed from are affirmed.

ANGELLOTTI, J.

We concur:

SHAW, J.
SLOSS, J.
HENSHAW, J.
LORIGAN, J.
MELVIN, J.

IN THE

Supreme Court of the United States

No. 215.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY, a Corporation, *Appellee,*

vs.

THE CITY OF POMONA (a Municipal Corporation), ET AL., *Appellants.*

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANTS ON THE EFFECT OF THE AMENDMENT TO SECTION 19 OF ARTICLE XI OF THE CONSTITUTION, ADOPTED ON OCTOBER 10, 1911.

This brief is occasioned by the information orally given by counsel for appellee that he proposed to urge before this Court that the amendment to Section 19 of Article XI of the Constitution, adopted on October 10, 1911, is to be construed as the blanket grant of a franchise to use the streets of all municipalities for the operation of any of the utilities mentioned in the section as amended, including *steam* and *electric* railroads and *telephone* lines, as well as water,

gas and lighting works, and regardless of whether or not there are publicly owned works in such municipalities. A contention such as this, involving rights of incalculable value to utility corporations and corresponding detriment to cities, we are unwilling to have rested upon such reply as can be made in oral argument. It is worthy of note that this same contention was urged as ground for hearing in *Sunset Tel. & Tel. Co. vs. Pasadena,* 42 Cal. Dec., 593, by the same company and by the same counsel, but rehearing was denied.

Section 19 of Article XI of the Constitution, as amended on October 10, 1911, is not to be construed as a blanket grant of a franchise from the State to use the streets of municipalities for the operation of telephone lines and the works of the other utilities mentioned. On the contrary, said section as amended repealed *in toto* Section 536 of the Civil Code, as re-enacted in 1905.

For convenience, we set forth in parallel columns Section 19 of Article XI as it stood prior to said amendment and as it now reads:

SEC. 19 OF ART. XI PRIOR TO ITS AMENDMENT.

"In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

SEC. 19 OF ART. XI, AS AMENDED ON OCTOBER 10, 1911.

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.* A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance." (Italics ours.)

Prior to its amendment Section 19 of Article XI of the constitution, as construed by the courts, did not "purport to grant the right to engage in the business of furnishing water, gas or electricity for general use," but presupposed "such power or right," and merely gave "the company or person having it the privilege of using the public streets as a way for its conduits" (*Clark vs. City of Los Angeles,* 116 Pac., 722, 729). Its purpose was to permit free and unlimited competition in the furnishing of water, gas and electricity. Where the public, pursuant to authority otherwise conferred by the State, itself conducted utilities for this purpose, the unrestricted privilege of using the streets was not extended, obviously with the idea that privately owned utilities should not be permitted to compete with publicly owned utilities without the consent of the public body operating the utility in question.

While this provision in the organic law at the time of its adoption (1879) was in harmony with the public policy which generally prevailed throughout the United States, as evidenced by the then constitutional and statutory provisions upon the subject, within the last decade a radical change in respect to the control of the secondary uses of city streets has taken place. This is best evidenced by the recent changes in the organic laws of the various States of the Union, a summary of which may be found on pages 1934-6 of Dillon on Municipal Corporations, Fifth Edition. By these constitutional provisions control of the secondary uses of city streets has been guaranteed to the cities them-

selves. As said by Judge Dillon (*Dillon on Municipal Corporations,* Fifth Edition, Sec. 1223, p. 1936): "These constitutional changes mark a distinct stage in the progressive development of our jurisprudence which we may well pausefully stop to consider." As pointed out by him, their "necessity originated in constantly growing private and public injuries and injustice arising from the free exericse of unrestrained legislative power," and they are "founded upon a true conception of the nature of streets in cities."

While the changes adverted to in other States have been taking place, there has been in California a noticeable trend toward the public ownership of utilities and the control by cities of privately owned utilities in respect to their occupation of the streets. The trend toward public ownership may be seen in the decisions of the courts (See *Clark vs. Los Angeles,* 116 Pac., 722; *Clark vs. Los Angeles,* 116 Pac., 966; *Platt vs. San Francisco,* 158 Cal., 74; *Hyatt vs. Williams,* 148 Cal., 585; *Davoust vs. Alameda,* 149 Cal., 69; *Cary vs. Blodgett,* 10 Cal. App., 463; *Madera Waterworks vs. Madera,* 185 Fed., 281); while the tendency toward a greater measure of local control may be seen in various constitutional and statutory provisions. When the constitution was adopted in 1879, a provision (taken from the constitution of the State of Missouri, and which was referred to in *St. Louis vs. Western Union Tel. Co.,* 149 U. S., 465) was inserted whereby any city containing a population of more than 100,000 inhabitants might frame a charter for its own government

(Section 8 of Article XI). From time to time this provision was amended until at the present time any city containing a population of more than 3,500 inhabitants may frame such a charter.

Prior to 1896 the provisions of a charter so framed were subject to the general laws of the State, but since 1896, so far as the provisions thereof are concerned with "municipal affairs," they are unaffected by such general laws. The scope of such charters is well indicated in *Sunset Tel. & Tel. Co. vs. City of Pasadena*, 42 Cal. Dec., 593 (see Appendix to opening brief), where it was held that the charter of the city of Pasadena invested it with full control over its streets, and that, therefore, in no event was that city subject to Section 536 of the Civil Code as re-enacted in 1905. Such provisions as pointed out in the case last cited are in accord with "long usage in such matters by virtue of which this power has been so frequently regarded as one proper for a municipality to possess." (See, also, State *ex rel. Tel. & Tel. Co. vs. Spokane*, 24 Wash., 53; *Memphis vs. Postal Tel. Cable Co.*, 145 Fed., 602, 606; *Blair vs. Chicago*, 201 U. S., 401, 457.) Many other cities in the State have framed their own charters pursuant to this constitutional authorization, and have invested themselves with the same broad power of control possessed by the city of Pasadena. The city of Pomona adopted such a charter in 1911. (Stats. 1911, pp. 1913-1957.)

Full control over its streets is there reserved to and vested in the city of Pomona and this charter,

as the organic law of the city, is entitled now to the same consideration as the charters of other cities in the State such as Pasadena.

In respect to the use of city streets by street railways, as pointed out in *San Francisco, etc., Ry. Co. vs. Scott,* 142 Cal., 222, 227, 228: "At the time the constitution was adopted the law provided that franchises for the construction and operation of street railroads along the streets and public highways could be obtained only from the governing body of the city or town in which it was situated." The same is true of the occupation of city streets by steam railroads. (See *Sunset Tel. & Tel. Co. vs. Pasadena,* appendix to opening brief, p. 137.)

Since 1893 the various franchise acts of the State, to which reference has heretofore been made, have provided for the granting of all franchises, not extended by the State through Section 19 of Article XI of the constitution, by the governing bodies of the local subdivisions of the State, and have provided many safeguards against the improvident extending of such privileges by local bodies. (See opening brief, pp. 91-96.) Again, at the same time that Section 19 of Article XI was amended, Section 23 of Article XII was radically changed so as to vest in the railroad commission a large measure of control over all public utilities, but careful reservation was made to municipalities of their existing powers over such utilities.

The amendment to Section 19 of Article XI of the Constitution voices the tendencies averted to in this

State, and brings the organic law of the State into harmony with those progressive provisions in the constitutions of other States, to which reference has been made.

It will be noticed that the primary purpose of the section as amended is to vest municipalities with broad power to own and operate their own utilities. Lest this be construed as impliedly prohibiting the establishment and operation of privately owned utilities, the amendment specifically provides that "persons or corporations may establish and operate works for supplying the inhabitants with such services." This can be done only "upon such conditions and under such regulations as the municipality may prescribe under its organic law," and lest municipalities might attempt to barter away their right of rate regulation, this salutary and essential power is specifically reserved. By vesting in municipalities the power to fix the conditions under its organic law upon which privately owned utilities may be operated, provision is made against unrestricted competition between publicly and privately owned utilities, or between the various privately owned utilities, without the consent of the municipality. "Upon such conditions" are words of broad meaning. Nothing in the section itself purports to establish any limitation whatsoever upon what these conditions may be. This is left to be worked out entirely under the organic law of the particular municipality.

Reference to the "organic law" is extremely significant. If it be contended that the "conditions"

to be prescribed are limited to regulations under the police power or "administrative regulations," such as were contended for by the street railway companies in *Blair vs. Chicago*, 201 U. S., 401, there would have been no occasion to insert the words "under the organic law," for the reason that Section 11 of Article XI of the California Constitution, adopted in 1879, specifically vests in all municipalities the power to make such regulations. A limitation of this character is thus expressly negatived by the constitution itself. By the amendment the intention is unmistakably shown to vest in municipalities the power to prescribe conditions of an entirely different character and such as relate to the proprietary control of the streets now so universally exercised by cities under the law.

One municipality may require the purchase of a franchise offered for sale to the highest bidder. Another may devise some method whereby compensation graduated according to the space appropriated for the secondary uses may be secured. Still another may prefer the indeterminate permit system adopted in the State of Wisconsin. But no matter what the conditions may be, so long as they conform to the organic law they find full warrant and specific authority in the constitution.

The appellee is here claiming rights of great value under what is urged to be a public grant. To such a grant as claimed the rule of street construction must be applied. This rule has frequently been enunciated by this Court. It is considered at length on pages 71 to 75 of the opening brief. It is not

out of place at this point to paraphrase the language of the Supreme Court of Washington in the case of *State ex rel. Tel. & Tel. Co. vs. Spokane,* 24 Wash., 53 (hereafter considered), in speaking of a similar constitutional provision of that State: "There is no prescription of rights referable to the streets of the city. All such rights are left to the municipality to determine."

Not alone is the language of the amendment, the constitutional and statutory policy prevailing in California, and the rule of strict construction applicable, opposed to the construction urged by the appellee, but the holdings of well considered cases are likewise opposed to such construction. On the other hand, the considerations adverted to and the cases which we will consider lead to the conclusion that the amendment must be given a precisely opposite effect—one that preserves to municipalities control over the secondary uses of their streets.

A somewhat similar constitutional scheme is found in the State of Washington. There the constitution (Sec. 19 of Article XII) provides that "Any association or corporation * * * shall have the right to construct and mantain lines of telegraph and telephone within this State. * * * The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." Section 4369 of Ballinger's Code gives effect to this section and provides that "where the right-of-way * * * is within the corporate limit of any incorporated city, the consent of the city council thereof shall be first obtained before

such telegraph and telephone lines can be erected thereon." In *State ex rel. Tel. & Tel. Co. vs. Spokane*, 24 Wash., 53, a telephone company brought a mandamus proceeding against the City of Spokane to require it to grant a franchise or privilege to construct its lines in the streets of said city. It was urged that the constitutional provision in question extended to the corporation the right to construct and maintain its lines. In speaking of this contention it was said by the Supreme Court:

> "The section of the constitution, however, is not self-operative, but requires the action of the legislature to give it effect. *There is no prescription of rights referable to the roads, highways, and streets of the State. The obvious construction of this provision is that all such rights were left to the discretion of the legislature. The only right absolutely declared is to maintain lines of telegraph and telephone within the State.*" (Italics ours.)

It will be seen that the only difference between the provisions of the Washington constitution and of Section 19 of Article XI of the California constitution, as amended, is that the former vests in the legislature the right to make reasonable regulations to give effect to the section, whereas the latter vests in municipalities the power to determine the conditions upon which its streets shall be used, thus harmonizing more completely with the trend toward vesting in cities the control of the secondary uses of their streets. Like the section of the Washington

constitution referred to we find in Section 19 of Article XI, as amended, "no prescription of rights referable to the roads, highways or streets." Rights in respect to the streets is left entirely to the determination of the municipality under its organic law.

Blair vs. Chicago, 201 U. S., 400, involved the duration of the franchises of the various street railway companies in the city of Chicago. The claim of the companies in brief was that under the Act of the Legislature of 1859, as amended in 1865, the term of their franchises was for 99 years. The Act of 1859 (See dissenting opinion, at p. 491) in brief authorizes and empowers the construction and maintenance of single or double track railways in the city of Chicago along or over such streets, etc., in said city as the Council of said city have authorized "in such manner and upon such terms and conditions" as the Council has or may by contract prescribe." This Act was amended in 1865 so as to extend the corporate life of the several companies to ninety-nine years. It was contended by the companies that under this State legislation they were possessed of an irrevocable grant from the State of the right to use the streets of the city of Chicago for street railway purposes for a term of ninety-nine years, and that the only right conferred upon the city was one of designation of streets and regulation by agreement with the companies of the "administrative" features of the occupancy. The city on the other hand contended there was no grant from the State to the railways to occupy said streets except with the authorization of the Council, and upon

such terms and conditions as that body saw fit to fix, including the duration of the right. The majority of the Court adopted the theory advanced by the city, saying (p. 460):

> "What, then, was conferred in the franchise granted by the State? It was the right to be a corporation for the period named, and to acquire from the city the right to use the streets upon contract terms and conditions to be agreed upon. The franchise conferred by the State is of no practical value until supplemented by the consent and authority of the council of the city."

The reference in the Act to authorization by the city was described as follows (p. 457): "It is an additional grant of right and power which the legislature requires the corporation to obtain as a condition precedent to its use and occupation of the streets." The opinion of Mr. Justice Lurton in *Louisville Trust Co. vs. Cincinnati,* 76 Fed., 296, 308, was quoted with approval as follows:

> "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation, in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant."

It was pointed out that the act conferred upon the railway companies the "right to use and occupy the streets of the city" but it was observed "this right was upon the terms prescribed in the law" (p. 457).

Continuing, it was said:

> "Conceding the plenary power of the legislature over the subject at that time, and that franchises, broadly speaking, are rights and privileges conferred by the State, and are derived from a grant of the sovereign power, nevertheless the State while exercising its authority might give to the city such measure of right and control in the manner as it saw fit. *Dill. Mun. Corp.*, 3d Sec., 705; *Railroad Company vs. Richmond*, 96 U. S., 521. The city is the corporate body directly interested in the use and control of the streets. By the charter of 1851 exclusive control over the streets was given to the council. That it was the intention of the legislature to give effect to the right of municipal control in the act under consideration is shown in its confirmation of terms already fixed by contract between the city and the companies. As to the future, companies were to have no right to the use and occupancy of the streets until they should obtain from the city council authority to that end, under contracts to be agreed upon as to terms and conditions. A more comprehensive plan of securing the city in the control of the use of the streets for railway purposes could hardly be devised. The company must be 'authorized' by the city council before it can lay its tracks or operate railways in the streets.

> This is more than to designate that for which authority has already been given. To authorize is to 'clothe with authority' (Webster's Dict.); 'to give legal power to' (Century Dict.)."

In reaching its conclusion, the Court applied the rule of strict construction of public grants in favor of the public.

The extent to which the holding of the majority of the Court goes in this case is emphasized by the dissenting opinion. Thus, it is said (p. 492) in the dissenting opinion of Mr. Justice McKenna:

> "The stress of the argument is on the words 'terms and conditions,' in the third division. The city contends, and the court *decides,* reversing the decree of the circuit court, that the authority of the city to prescribe terms and conditions of the occupation of the streets included the authority to fix the time of occupation."

See, also:

> *Chicago General Ry. Co. vs. Chicago,* 176 Ill., 253.
> *Providence vs. Union R. Co.,* 12 R. I., 473.
> *Louisville Trust Co. vs. Cincinnati,* 76 Fed., 296, 308.
> *Detroit Citizen's St. Ry. Co. vs. Detroit,* 64 Fed., 628.

This Court may here properly consider Section 19 of Article XI of the Constitution as amended in October, 1911. A decree granting an injunction

based upon a law repealed after the entry of such decree, but prior to the determination of the appeal therefrom, will not be affirmed.

Cooley's Const. Lim., 6th Ed., 469.
3 Cyc., 407-8.
United States vs. Schooner Peggy, 1 Cr., 103-110, 2 Law Ed., 49, 51.
Yeaton vs. United States, 5 Cr., 281.
Mills vs. Green, 159 U. S., 651, 6, 7; 40 Law. Ed., 293, 4, 5.
New Orleans Flour Inspectors vs. Glover, 160 U. S., 170; 40 Law Ed., 382.
Dinsmore vs. So. Express Co., 183 U. S., 115-120; 46 Law Ed., 111, 113.
Linn Co. vs. Hewitt, 55 Iowa, 505.
Vance vs. Rankin, 194 Ill., 625, 7, 8.
Wade vs. St. Mary's Industrial School, 43 Md., 178.
Muskogee Nat. Tel. Co. vs. Hall (Ind. T.), 64 S. W., 600, 604.

The rule is stated in 3 Cyc., 407, as follows:

> "It is the general rule—although not invariably accepted—that an appellate court must decide and dispose of the case in accordance with the laws existing at the time of its own decision, even though it lead to the reversal of a judgment which was proper at the time of its rendition, or the affirmance of one wherein there was error which has since been obviated by a change in the law."

As said by Chief Justice Marshall in *United States vs. Schooner Peggy, supra:*

"It is, in general, true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decisions of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

In *Vance vs. Rankin, supra,* it was said:

"The effect of the repeal of a statute is to obliterate the statute repealed as completely as if it had never been passed, and it must be considered as a law that never existed, except for the purposes of those actions or suits which were commenced, prosecuted and concluded while it was an existing law. * * * This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may therefore reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by an absolute repeal."

The repeal of Section 536 of the Civil Code as re-enacted in 1905 by the amendment of Section 19 of Article XI of the Constitution adopted on October 10, 1911, neither impairs the obligation of any contract of the company arising under said Section 536, nor assails any of its vested rights.

Section 1 of Article XII of the Constitution of 1879 provides:

> "Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

Section 21 of Article I of the Constitution of 1879 provides:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislature, nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

Section 327 of the Political Code (enacted in 1872) provides:

> "Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal."

Since this litigation was instituted, the State Supreme Court, in the case of *Western Union Tel. & Tel. Co. vs. Hopkins,* 116 Pac., 557, has held that Section 536 of the Civil Code, prior to its re-enactment of 1905, was the grant of a right to telegraph corporations to use the streets for the maintenance of telegraph lines, and that the acceptance of such grant by the construction or maintenance of a telegraph system created an inviolable contract with the state secure against impairment by subsequent legislation. To construct and erect were held to necessarily imply the right to maintain.

This Court, however, is free to exercise its independent judgment in respect to the character of any contract created, and whether the same has been impaired by any subsequent action upon the part of the State. *County of Shelby vs. Union Planters Bank,* 161 U. S., 149.

The case cited above was an action brought by the bank to enjoin the collection by the county of a tax laid upon the surplus of the bank on the ground that such surplus was exempt under a clause in the bank's charter. An injunction was granted in the Circuit Court. It appeared that the Supreme Court of Tennessee had sustained the claim to exemption (see *Bank of Commerce vs. State of Tennessee,* 116 U. S., 134, 40 L. Ed., 645). Notwithstanding this fact the decree of the Circuit Court was reversed. In the opinion it was said:

> "The decision giving exemption to both classes of property was adjudged alone upon the authority cited. In such a case as this, where

> we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, we are not bound by the previous decisions of the state courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves independently of the decisions of the State courts, whether there is a contract and whether its obligation is impaired."

The conclusion of the State Supreme Court in *Western Union Tel. Co. vs. Hopkins, supra,* respecting the effect of the constitutional and statutory provisions upon the contract found to have been created is entirely out of accord with the conclusions reached by this court under similar constitutional and statutory provisions. It is worthy of note in this connection that the State Supreme Court in this case did not pass upon the effect of Section 21 of Article I of the constitution.

No vested contractual rights can arise in the face of such provisions.

Shields vs. Ohio, 5 Otto, 319; 24 Law. Ed., 357;
Hamilton Gas Light & Coke Co. vs. City of Hamilton, 146 U. S., 258;
San Antonio Traction Co. vs. Altgelt, 200 U. S,. 304;
Bienville Water Supply Co. vs. City of Mobile, 186 U. S., 212.

In *Shields vs. Ohio, supra,* this Court considered an act of the Ohio legislature prescribing the rate of fare for railroad companies. It appeared that certain railroad companies had been consolidated by virtue of certain permissive statutes. In rendering its opinion the Court said:

> "The constitutional provision that no 'special privileges or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly,' entered into the acts under which the consolidations were made, and rendered the corporations created and the franchises conferred subject to repeal and alteration, just as if they had been expressly declared to be so by the act. The Act of 1873, in the particular in question, was a legitimate exercise of the reserved power of alteration, and was therefore valid. *Parker vs. R. R. Co.,* 109 Mass., 506.
>
> "Another branch of the argument of the counsel for the plaintiff in error calls for some further remarks.
>
> "It is urged that the franchise here in question was property held by a vested right, and that its sanctity, as such, could not be thus invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The company took the franchise, subject expressly to the power of alteration or repeal by the general assembly. There is, therefore, no ground for just complaint against the state."

In *Hamilton Gas Light & Coke Co. vs. City of Hamilton, supra,* it was said:

> "By the Constitution of Ohio, adopted in 1851, it was declared that no 'special privileges or im-

munities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly;' that 'the general assembly shall pass no special act conferring corporate powers;' and that 'corporations may be formed under general laws, but all such laws may, from time to time, be altered or repealed.' *Const. Ohio, Sec. 2, Art. 1; Secs. 1, 2, Art. 13.* If the statute under which the plaintiff became incorporated be construed as giving it the exclusive privilege, so long as it met the requirements of law, of supplying gaslight to the City of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant, as respects, at least, its exclusive character, was subject to the power of the legislature, reserved by the state constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation."

In *San Antonio Traction Co. vs. Altgelt, supra,* the Court considered the effect of an act of the legislature requiring the street railway company to issue tickets for school children at a low rate of fare as impairing the obligation of the contract claimed to exist between the company and the State. For the purpose of the decision the court assumed that an ordinance of the city of San Antonio fixing the rate of fare to be charged by the company constituted a contract. In denying the company's contention that the subsequent act of the legislature impaired the obligation of such contract, this court, by Mr. Justice Brown, said:

> "Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which, in Section 7 of the bill of rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof.
>
> "An important consideration in this connection is that the alleged contract was made twenty-three years after the constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the legislature itself, but by a municipal corporation, since that is but an agency of the State, to which is delegated the power to regulate street railways and other municipal franchises. We have repeatedly held that whereas railway was originally chartered before a new

> Constitution took effect (and hence such charter was not limited thereby), yet, if such road be subsequently consolidated with other roads, or accepts new privileges, after a new constitution takes effect, all contracts, privileges and franchises conferred after the adoption of such constitution are subject to its provisions." * * *
>
> "It is true that in this ordinance it was provided that all rights and privileges previously granted to the street railway company and the Edison Company were conferred unto the traction company, including all the limitations, contracts and obligations; but this ordinance must be construed in connection with the constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the Court of Civil Appeals of Texas in this case, which expressly waived the question whether the provision of the former ordinance fixing a 5 cent fare constituted a contract or not, declaring that if it did, it was subject to further legislative control."

In respect to the duration of the right granted by Section 536 (assuming said section was not repealed by the Broughton act) as pointed out in *Omaha Electric Light & Power Co. vs. Omaha,* 179 Fed., 455, 458, it was either (1) in perpetuity or (2) for a reasonable time to be determined in view of all the circumstances or (3) revocable at will.

Does Section 21 of Article 1 of the constitution and the other reservations quoted so enter into any contract arising under Section 536 as to render the right in respect at least to its duration subject to termination without impairing the obligation of the con-

tract? This court has held that under such reservations the EXCLUSIVE character of a grant might be withdrawn without impairing the obligation of the contract, and in principle there is no difference between this and a holding that the *perpetual* feature of the grant may be revoked. This was the conclusion reached by Judge Wellborn in the Circuit Court (Tr., p. 136).

Further as bearing upon the nature of the contract, if any, which arose as between the company and the State under Section 536 of the Civil Code as re-enacted in 1905, and which this court is here free to determine for itself, we call attention briefly to the legislation which was enacted at the session of the legislature of 1905.

Section 764 of the Municipal Government Act which deals with the powers of the municipalities of the 5th class, was amended in some minor parts. The amendment to this section was approved March 3, 1905, said amendment becoming effective sixty days after said date (Stats. and Amendments 1905, page 45). We call attention to Subdivision 4 and Subdivision 13 of said Section vesting in the city the power:

> Subdiv. 4. "To establish, build, and repair bridges; to establish, lay out, alter, keep open, improve, and repair streets, sidewalks, alleys, squares, and other public highways and places within the city, and to drain, sprinkle, and light the same; to remove all obstructions therefrom; to establish the grades thereof; to grade, pave, macadamize, gravel and curb the same in whole

or in part, and to construct gutters, culverts, sidewalks, and crosswalks therein or upon any part thereof; to cause to be planted, set out, and cultivated shade trees therein; *and generally to manage and control all such highways and places.*"

Subdiv. 13 (p. 254). "To permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam, or other power thereon, and the laying of gas and water pipes in the public streets; and to construct and maintain and *to permit the construction and maintenance* of telegraph and telephone lines therein."

The provisions of these Subdivisions were unchanged by the amendment and had existed on the statute books for many years.

Section 536 of the Civil Code, as previously pointed out, was repealed and re-enacted. This Act was approved March 20, 1905, and took effect, except as repealed, sixty days after date. (Statutes and Amendments, 1905, p. 441.)

Two days later the Broughton Act was adopted to take effect immediately. (Stats., 1905, p. 777.) The quoted provisions of Section 764 of the Municipal Government Act and the Broughton Act are in no wise inconsistent or repugnant, but rather fit together as parts of a complete legislative scheme. *Thompson vs. Supervisors,* 111 Cal., 553.

The scope and purport of this legislation, adopted at the same session of the legislature bearing upon the subject of telegraph and telephone lines in the

streets of municipalities, is best seen by reading the important provisions of the said acts together. Thus:

> *"Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."* (Sec. 536, C. C.) *"The common council* (of municipal corporations) *has power * * * to establish, lay out, alter, keep, open, improve and repair streets, sidewalks, alleys, squares, and other public highways and places within the city; * * * to remove all obstructions therefrom * * * and generally to manage and control all such highways and places: * * * and to construct and maintain and to permit the construction and maintenance of telegraph* and *telephone * * * lines therein."* (Stat., 1905, p. 45.) *"Every franchise or privilege to erect or lay telegraph or telephone wires * * * upon any public street or highway * * * except telegraph or telephone lines doing an interstate business * * * shall be granted* (only after advertisement and to the highest bidder, etc.), *and not otherwise."* (Stat., 1905, p. 777.)

The following cases passing upon similar statutory provisions we commend to the Court's attention:

St. Louis vs. Western Union Tel. Co., 149 U. S., 465, 469-71; 37 Law Ed., 810.
Postal Telegraph Cable Co. vs. Baltimore, 79 Md., 502, 510.
Postal Telegraph Cable Co. vs. Baltimore, 156 U. S., 210.
City of Memphis vs. Postal Telegraph Cable Co., 145 Fed., 602.
Pensacola vs. Southern Bell Tel. Co., Fla., 37, S. O., 820.
Blair vs. Chicago, 201 U. S., 200.

Again, the lines destroyed or threatened by the city of Pomona were constructed or maintained wrongfully and without competent authority. Even though Section 536 as re-enacted in 1905 continued in full force until repealed in October, 1911, the continued maintenance of these lines wrongfully constructed or maintained in the first instance would give rise to no contractual right authorizing their maintenance for all time to come. The elements going to make up a contract are entirely wanting.

Should this court be of the opinion either that Section 536 as re-enacted in 1905 was not repealed by the Broughton act or that the lines of the company fell within the category of lines doing an interstate business, nevertheless we urge that the decree appealed from should be reversed upon the ground that Section 536 was repealed *in toto* by the amend-

ment in 1911 of Section 19 of Article XI of the constitution, and that no question of vested rights under Section 536 as re-enacted has been presented which would prevent this Court from giving full effect to such repeal.

CONCLUSION.

A contention such as here made by the appellee, no matter how groundless it may be, gravely embarrasses effective enforcement of public rights, and its speedy determination is, therefore, greatly to be desired. It is, we submit, without reason or authority. On the other hand, as we have pointed out, Section 19 of Article XI as amended must be given an entirely opposite effect to that urged by appellee.

Respectfully submitted,

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Office Supreme Court, U. S.
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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 215.

THE CITY OF POMONA ET AL., APPELLANTS,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY
(A CORPORATION), APPELLEE.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEE.

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PILLSBURY, MADISON & SUTRO,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 215.

THE CITY OF POMONA ET AL., APPELLANTS,

vs.

SUNSET TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION), APPELLEE.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF ON BEHALF OF APPELLEE.

Statement of the Case.

This is an appeal from a decree of the United States Circuit Court of Appeals for the Ninth Circuit, entered on August 2, 1909, reversing a decree of the United States Circuit Court for the Southern District of California, Southern Division, in favor of the appellants, and directing that

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judgment be entered in favor of the appellee (Tr., pp. 361, 362).

The suit arises out of a controversy between the appellee, a corporation organized and existing under the laws of California, for the purpose of doing a general telephone and telegraph business throughout that State and in the States of Oregon, Washington, Nevada, Utah and Arizona, and the appellants, the City of Pomona, a municipal corporation of the fifth class, in the County of Los Angeles, State of California, and certain of its officers, over the right of the appellee to continue to construct, maintain and operate its telephone system, consisting of poles and wires, in the streets and highways of Pomona, without a special franchise therefor from the City.

No question of the right of the City to make a charge against the appellee for the use of those portions of the streets, actually occupied by it, is involved in the case.

On August 8, 1888, the City of Pomona passed an Ordinance, No. 30, granting to Sunset Telephone-Telegraph Company (a corporation distinct from the appellee, Tr., pp. 178, 179, 316, 317) a franchise to erect poles and telephone wires along the public streets of the City for ten years (Tr., pp. 95-96). The appellee was incorporated in April, 1889 (Tr., pp. 178, 179, 180). In May, 1889, the Sunset Telephone-Telegraph Company transferred all of its property to the appellee, including whatever rights it had under the foregoing Ordinance No. 30. Since the month of May, 1889, the appellee has done a general telephone business throughout California, including the City of Pomona, and in many parts of Oregon, Washington and Nevada, and the lines of poles and wires in Pomona have always been an integral and essential part of its entire system, maintained and operated in these States (Tr., p. 161). In its system in these States the appellee owns and has in use over 133,000 miles of wire and over 100,000 poles; it uses over 130,000 telephones, and it has over 1,200 offices, of

which 451 are exchange, or gathering stations; the mileage of wire used exclusively for long distance business is over 35,000 miles. Subscribers of the appellee, or any other person using its system, in any city or town, or place, including Pomona, in any one of these several States, can and do hold conversations by telephone with other subscribers and persons in other cities, towns and places reached by the system of appellee in any one of these several States (Tr., pp. 158, 159).

On August 8, 1898, the term of the franchise, granted by Ordinance No. 30, expired by its own limitation; but the appellee continued to construct, maintain and operate its system in Pomona, without any question on the part of the City as to its right to use the public streets and highways for its poles and wires, until some time in the year 1902 (Tr., p. 171). In that year the City began to agitate the question that the appellee should secure a franchise from the City, as a condition to the continued maintenance and operation of its telephone system in the City.

On August 1, 1905, after numerous negotiations and transactions between the City and the appellee and which it is unnecessary to here relate, the Board of Trustees of the City passed a "Resolution Declaring Posts, Wires and Apparatus of Sunset Telephone-Telegraph Company an Obstruction and Public Nuisance". The resolution declared that "the telephone poles, wires and apparatus of said "Sunset Telephone-Telegraph Company employed in doing "*State and local telephone business* within the City of "Pomona, be and all of them are hereby declared to be an "obstruction and a public nuisance on all the streets of said "City"; also "that the Street Superintendent of said City be "and he is hereby instructed to forbid and prevent any "future installation, or extension of said telephone poles, "wires and apparatus"; also "that unless said company ob-"tains such a franchise from said City within 30 days from "date hereof the Street Superintendent of said City be and

" he is hereby further instructed to remove all said telephone " poles, wires and apparatus from the streets of said City" (Tr., p. 20). The City Clerk was directed to cause a certified copy of the resolution to be served upon the Sunset Telephone-Telegraph Company at its office in Pomona.

On August 10, 1905, the Superintendent of Streets gave notice to the appellee that "in accordance with the facts and " conclusions stated in said resolution * * * all the " poles, wires and apparatus of said company employed in " doing a State and local telephone business within the City " of Pomona are hereby declared a public nuisance and ob- " struction upon all the streets of said City and hereby " ordered to be removed from all the streets of said City " within thirty days from August 1st, 1905, or I shall im- " mediately proceed to remove the same" (Tr., p. 21). On September 1, 1905, the Street Superintendent of the City, and the City Attorney, R. G. Loucks, commenced the destruction of the appellee's lines in Pomona, and cut down and destroyed more than a mile of its poles and lines and disconnected the same from its system (Tr., p. 307). The lines and poles so cut down were an integral part of the appellee's general interstate telephone and telegraph system (Tr., p. 165).

On September 5, 1905, the appellee filed its bill of complaint for an injunction to prevent the City and its officers from further destroying its system. Upon the filing of the bill, the Court issued a restraining order, and an order to show cause why an injunction *pendente lite* should not be issued.

Thereafter the order to show cause was heard and submitted upon affidavits and briefs, and on September 24, 1906, the Court filed its conclusions and ordered that a temporary injunction should issue, as prayed for in the bill of complaint (Tr., pp. 116-118).

After the cause was at issue, instead of taking any testimony, the parties, with the approval of the Court, on July

12, 1907, stipulated for the final hearing of the cause upon practically the same record as that upon which it had been submitted on the application for a preliminary injunction (Tr., p. 112). On August 31, 1908, the Court filed its opinion that the preliminary injunction should be dissolved and the bill dismissed (Tr., pp. 119-139). In accordance with this opinion, a final decree was signed and filed on December 19, 1908 (Tr., pp. 115, 116). This decree was reversed by the decree of the Circuit Court of Appeals.

Briefly stated, the grounds, upon which the appellee contended that it had the right to have its system in the streets of the City of Pomona, without a special franchise therefor from the City, and upon which it sought relief by its bill of complaint in the Circuit Court, were as follows:

First. It claimed that in 1889 it had accepted the grant of right, extended by Section 536 of the Civil Code of California to Telegraph Companies, and which, it contended, included also Telephone Companies, and that by the construction, maintenance and operation of its system in the streets of Pomona, under the acceptance of this grant, a contract, that could not be impaired by the State, had arisen between it and the State, for the continued maintenance and operation of the system in Pomona, without a special franchise therefor from the City.

Second. It claimed a similar contract had arisen between it and the City by reason of the expenditure by it of certain large sums of money, at the instance of the City, and subject to the agreement of the City that, in consideration of these expenditures, the appellee, should not be required to secure a franchise.

Third. It claimed that, being a Telegraph Company and operating a telegraph system extending throughout the State of California and in the States of Oregon, Washington and

Nevada, over which it does a regular commercial telegraph business, it had the right, under the Act of Congress of July 24, 1866, known as the "Federal Telegraph Act", to have its system in the streets of Pomona, inasmuch as its wires there, were used as a part and in aid of its telegraph business.

Fourth. It claimed that it does both an interstate telephone as well as an interstate telegraph business, and that, as the California Franchise Act of 1905 excepted from its operation Telegraph and Telephone Companies doing an interstate business, the appellee was not required to secure a franchise from Pomona.

The Circuit Court decided all of these contentions against the appellee. The Circuit Court of Appeals decided that the Circuit Court had erred, in holding that the word "telegraph" in Section 536 of the Civil Code, as originally enacted, did not include Telephone Companies, and that, inasmuch as the acceptance of the provisions of that section by the appellee, in 1889, by the construction, maintenance and operation of its system in Pomona, had created a contract between the appellee and the State, the appellee had the right to use the streets of Pomona for its system without a special franchise from the City.

Questions Involved.

First. The Circuit Court of Appeals had jurisdiction of the appeal from the Circuit Court.

Second. The appellee has the right, under Section 536 of the Civil Code of California, as re-enacted in 1905, to use the streets of the City of Pomona for its telephone system, without a special franchise therefor from the City.

Third. The appellee has the right, under Section 19 of Article XI of the Constitution of the State of California, as amended October 10, 1911, to use the streets of the City of Pomona for its telephone system, without a special franchise therefor from the City.

Statutory Provisions.

Section 536 of the Civil Code of California, as originally enacted, on March 21, 1872, was as follows:

> "Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

As reenacted in 1905, Section 536 is as follows:

> "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters" (Stats. of Cal. 1905, pp. 491, 492).

The Franchise Act, of 1905, is as follows:

> "An Act providing for the sale of street railroad and other franchises in counties and municipalities and providing conditions for the granting of such franchises by legislative or other governing bodies and repealing conflicting acts."
>
> Sec. 1. Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate

street or interurban railroads upon any public street or highway, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat and power along or upon any public street or highway, or to exercise any other privilege whatever hereafter proposed to be granted by boards of supervisors, boards of trustees, or common councils, or other governing or legislative bodies of any county, city and county, city or town within this state, except steam railroads and except telegraph or telephone lines doing an interstate business, and renewals of franchises for piers, chutes or wharves, shall be granted upon the conditions in this act provided, and not otherwise.

"Sec. 2. An applicant for any franchise or privilege above mentioned shall file with the governing or legislative body of the county or municipality an application, and thereupon said governing body shall, in its discretion, advertise the fact of said application, together with a statement that it is proposed to grant the same, in one or more newspapers of the county, city and county, city or town wherein the said franchise or privilege is to be exercised. Said advertisement must state that bids will be received for such franchise, and that it will be awarded to the highest bidder, and the same must be published in such newspaper once a day for ten successive days, if it be a daily newspaper, and if there be no daily newspaper published in such county, city and county, city or town, then it shall be published in a weekly newspaper once a week for four successive weeks, and in either case the full publication must be completed not less than twenty nor more than thirty days before any further action can be taken thereon.

"Sec. 3. The publication must state the character of the franchise or privilege proposed to be granted, the term for which it is granted, and, if it be a street railroad, the route to be traversed; that sealed bids therefor will be received up to a certain hour and day named therein, and that the successful bidder and his assigns must, during the life of said franchise, pay to the county or municipality two per cent (2%) of the gross annual receipts of the person, partnership or

corporation to whom the franchise is awarded, arising from its use, operation or possession. No percentage shall be paid for the first (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited; provided, further, that if the franchise be a renewal of a right already in existence, the payment of said percentage of gross receipts shall begin at once.

"Sec. 4. In case the franchise granted shall be an extension of an existing system of street railroad, then the gross receipts shall be estimated to be one-half of the proportion of the total gross receipts of said system which the mileage of such extension bears to the total mileage of the whole system, and said estimate shall be conclusive as to the amount of the gross receipts of said extension.

"Sec. 5. Said advertisement shall also contain a statement that the said franchise will be struck off, sold and awarded to the person, firm or corporation who shall make the highest cash bid therefor; provided, only, that at the time of the opening of said bids any responsible person, firm or corporation, present or represented, may bid for said franchise or privilege, a sum not less than ten per cent above the highest sealed bid therefor, and said bid so made may be raised not less than ten per cent by any other responsible bidder, and said bidding may so continue until finally said franchise shall be struck off, sold, and awarded by said governing body to the highest bidder therefor in gold coin of the United States. Each sealed bid shall be accompanied with cash or a certified check payable to the treasurer of such county or municipality, for the full amount of said bid, and no sealed bids shall be considered unless said cash or check is enclosed therewith and the successful bidder shall deposit, at least ten per cent of the amount of his bid with the clerk of such county or municipality, before the franchise shall be struck off to him. And if he shall fail to make such deposit immediately, then and in that case, his bid shall not be received, and shall be considered as void, and the

said franchise shall then and there be again offered for sale to the bidder who shall make the highest cash bid therefor, subject to the same conditions as to deposit, as above mentioned. Said procedure shall be had until said franchise is struck off, sold, and awarded to a bidder who shall make the necessary deposit of at least ten per cent of the amount of his bid therefor, as herein provided. Said successful bidder shall deposit with the clerk of such county or municipality within twenty-four hours of the acceptance of his bid, the remaining ninety per cent of the amount thereof, and in case he or it shall fail to do so, then the said deposit theretofore made, shall be forfeited, and the said award of said franchise shall be void, and the said franchise shall then and there, by said governing body, be again offered for sale to the highest bidder therefor, in the same manner, and under the same restriction as hereinbefore provided, and in case said bidder shall fail to deposit with the clerk of such county or municipality, the remaining ninety per cent of his bid, within twenty-four hours after its acceptance, the award to him of said franchise shall be set aside, and the deposit theretofore made by him shall be forfeited, and no further proceedings for a sale of said franchise shall be had unless the same shall be readvertised and again offered for sale, in the manner hereinbefore provided.

"Sec. 6. Work to erect or lay telegraph or telephone wires, to construct street railroads, to lay gas pipes for the purpose of carrying gas for heat and power, to erect poles or wires for transmitting electric heat or power, along or upon any public street or highway, or to exercise any privilege whatever, a franchise for which shall have been granted in accordance with the terms of this act, shall be commenced in good faith within not more than four months from the granting of any such franchise, and if not so commenced within said time said franchise so granted shall be declared forfeited, and shall be completed within not more than three years thereafter, and if not so completed within said time said franchise so granted shall be forfeited; provided, that for good cause shown the governing or legislative

body may by resolution extend the time for completion thereof, not exceeding three months.

"Sec. 7. The successful bidder for any franchise or privilege struck off, sold, and awarded under this act shall file a bond running to said county, city and county, or city or town, with, at least, two good and sufficient sureties to be approved by such governing body, in a penal sum by it to be prescribed, and set forth in the advertisement for bids, conditioned that such bidder shall well and truly observe, fulfill and perform each and every term and condition of such franchise, and that in case of any breach of condition of such bond, the whole amount of the penal sum therein named shall be taken and deemed to be liquidated damages, and shall be recoverable from the principal and sureties upon said bond. Said bond shall be filed with such governing body within five days after such franchise is awarded, and upon the filing and approval of such bond, the said franchise shall, by said governing or legislative body, be granted by ordinance to the person, firm or corporation to whom it has been struck off, sold, or awarded, and in case that said bond shall not be so filed, the award of such franchise shall be set aside, and any money paid therefor shall be forfeited, and said franchise shall, in the discretion of said governing or legislative body, be readvertised, and again offered for sale in the same manner and under the same restrictions as hereinbefore provided.

"Sec. 8. It shall be the duty of the attorney general, upon the complaint of any county or municipality, or in his discretion, upon the complaint of any taxpayer, to sue for the forfeiture of any franchise granted under the terms of this act, for the noncompliance with any condition thereof.

"Sec. 9. No clause or condition of any kind shall be inserted in any franchise or grant offered or sold under the terms of this act, which shall directly or indirectly restrict free and open competition in bidding therefor, and no clause or provision shall be inserted in any franchise offered for sale, which shall in anywise favor one person, firm or corporation, as against another, in bidding for the purchase thereof.

"Sec. 10. Any member of any common council or other governing or legislative body of any county, city or town of this state, who, by his vote, violates or attempts to violate the provisions of this act, or any of them, shall be guilty of a misdemeanor, and may be punished therefor as provided by law, and may be deprived of his office by the decree of a court of competent jurisdiction, after trial and conviction.

"Sec. 11. All acts, or parts of acts, in conflict herewith are hereby repealed; provided, however, that nothing herein contained shall be construed as repealing, or amending the following acts, to-wit: 'An Act relating to the granting by the counties and municipalities of franchise for the construction of paths and roads for the use of bicycles and other horseless vehicles,' approved March twenty-seventh, eighteen hundred and ninety-seven; 'An Act to authorize cities and towns to grant franchises for the construction and maintenance of railroads beyond the limits of such cities or towns leading to public parks owned thereby,' being chapter forty of the laws of eighteen hundred and ninety-seven of the state of California.

"This act shall take effect immediately."

(Stats. of Cal. 1905, p. 777.)

Argument.

FIRST.

A. THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO HEAR AND DETERMINE THE APPEAL FROM THE CIRCUIT COURT.

Appellants first contend that the Circuit Court of Appeals had no jurisdiction to hear and determine the appeal from the Circuit Court. This contention, we submit, is without merit.

The jurisdiction of the Circuit Court in this case was originally invoked by the appellee, both because it involved the application of the Constitution of the United States and, also, because of the rights asserted by the appellee, as a *Telegraph Company,* under the Act of Congress of July 24, 1866, 14 Stat. 221, c. 230 (Tr., pp. 4, 5, 8, 12, 13). Under these circumstances, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court.

See:

Chicago Junction Ry. Co. v. King, 32 Sup. Ct. Rep. 79, decided Dec. 11, 1911;

Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 407;

Carter v. Roberts, 177 U. S. 496, 500;

Robinson v. Caldwell, 165 U. S. 359, 361;

In re Can Pon et al., 168 Fed. 479, 481;

Hooper v. Remmel, 165 Fed. 336, 338;

Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612;

Mills v. Provident Life & Trust Co., 100 Fed. 344, 348;

The appellants do not dispute this rule, but they deny that it is applicable, because they assert that, first, the ap-

pellee's claim of rights under the Act of July 24, 1866, was never substantially involved in the case, and second, the rights of the appellee under that Act, they contend, have been determined by this Court and have ceased to be federal questions.

The appellee, in its bill of complaint, relied upon its rights, *as a telegraph company,* under the Act of July 24, 1866, as one of the principal grounds for invoking the jurisdiction of the Federal Court and for obtaining the relief sought (Tr. pp. 4, 5, 11, 12, 13). It is true, as appellants say, that this Court in the case of *Richmond v. Southern Bell Telephone & Telegraph Co.,* 174 U. S. 761, decided that that Act confers no rights upon telephone companies. But, the Court, in its opinion in that case, pointed with emphasis to the fact that the appellee there was only a *telephone* company (174 U. S. 761, 765, 773). Unlike the appellee in that case, the appellee in the case at bar, however, *is a telegraph as well as a telephone company,* and *it does a telegraph as well as a telephone business.* There are complete averments in its bill of complaint in this behalf (Tr. pp. 5, 7, 9, 10), supported by a mass of evidence (Tr. pp. 140, 147, 150, 158, 159-163, 168-170, 178-181), showing that the appellee, upon its incorporation, complied with the particular provisions of the California statute, regarding *telegraph* corporations (Civil Code, Section 291), that it maintained at Pomona, as well as at its other offices, or exchanges, telegraph instruments and appliances whereby telegraph messages, in the ordinary course of a regular telegraph business, were, for some years prior to the commencement of this action sent from and received for subscribers of the appellee at Pomona. These messages were sent over the lines and wires of the appellee to and from other cities and towns, in the State of California, and to and from cities and towns, in the States of Oregon, Washington and Nevada (Tr. pp. 140, 147, 150, 159, 161, 169, 175). It showed that it had, as a *telegraph* company, accepted the provisions of the Act of July 24, 1866, as required by that

Act (Tr. p. 181) and that it also had on file, in its various offices, a schedule of rates, fixed annually by the Postmaster General of the United States for the transmission of telegrams (Tr. p. 159). The Circuit Court itself recognized that the appellee does *a telegraph* business, for in its Statement of the Case, in its opinion on the final hearing, it said:

> "Complainant, a California corporation, does a telephone business in the City of Pomona, California, and for this purpose has constructed and maintains local lines running from its central station to its subscribers in said city. *Complainant also does a telephone and telegraph business in the States of California, Oregon, Washington and Nevada, under one general system,* owning and using 133,000 miles of wire, of which more than 35,000 miles are used exclusively for long distance messages, 130,000 telephones, 1200 offices, of which 451 are exchange stations, and over 100,000 poles, and the lines of this system run into said city and terminate at said central station" (Tr. p. 119. Italics ours).

After devoting, however, a considerable portion of its opinion to a discussion of the right, claimed by the appellee, as a *telegraph company,* under the Act of July 24, 1866, to have its system in Pomona, without a special franchise from the City, it resolved this contention against the appellee (Tr. pp. 125-130).

Upon its appeal to the Circuit Court of Appeals, the appellee assigned as error all of the conclusions of the Circuit Court in this connection (Tr. pp. 336-339, Assignments of Error Nos. XXXI-XXXVIII). But, after the case had reached that Court, and the appellee had considered what points it should urge upon that appeal, it stated, as it had the unquestioned right to do, its reasons for not urging before that Court the claim, which it had in good faith asserted in the Court below, under this Act of Congress. In its brief in the Circuit Court of Appeals, the appellee said:

> "In the Court below the appellant, as one of the separate grounds upon which it relied for relief,

> urged that it had the right to have its system in Pomona, without a special franchise from the City, under the provisions of the Act of Congress, approved July 24, 1866 (14 Stat. 221, c. 230), entitled 'An Act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military and other purposes.' That Act gives to telegraph companies the right to construct, maintain and operate lines of telegraph * * * over and along any of the military or post roads of the United States, which may have been or may be declared such by Congress, while the Act of March 1, 1884 (23 Stat. 3, c. 9), provides 'That all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes.' It was the contention of the appellant that it had the right to construct and maintain its telephone lines in Pomona under the provisions of that Act, because those lines are used in aid of, and are an integral part of, its telegraph system, for the reason that the same are used for the transmission by articulate speech, from the central office, or exchange, of the appellant at Pomona, to local subscribers, of interstate telegrams, received entirely over the lines of the appellant, at its said central office, or exchange" (Appellant's Brief Circuit Court of Appeals, pp. 2, 3).

With reference to the rights claimed by the appellee under the Act of July 24, 1866, the Circuit Court of Appeals said:

> *"While in the Court below, the complainant's alleged rights were in part based upon the Act of Congress of July 24, 1866,* entitled 'An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes' (14 Stat. 221), *which Act entered into the consideration of the Court below* and *is much discussed on the present appeal by counsel for the appellees,* no right growing out of that act is here asserted on the part of the appellant, and hence we omit all reference to it" (italics ours, Tr. p. 348; 172 Fed. 830, 831).

Whatever the position of the appellee with respect to this Act may have been in the Circuit Court of Appeals, we submit, is immaterial; the facts, determining whether or not the claim of right under that Act was substantial, are the assertion of the right in good faith in the bill of complaint and the evidence offered in support thereof.

The mere fact that the Circuit Court decided against the contention of the appellee, that the potential agency of its telephone lines in Pomona, in the receipt and delivery, between its central exchange at Pomona and its subscribers there, of telegraph messages, received entirely over its own lines, was not sufficient to entitle those lines to the benefits of the Act of Congress of July 24, 1866, is no proof that the claim to these benefits was not made by the appellee in perfect good faith. This particular question, moreover, has never been decided adversely to the appellee.

Under these circumstances, we submit, the Circuit Court of Appeals had jurisdiction of the appeal from the Circuit Court.

SECOND.

THE APPELLEE HAS THE RIGHT, UNDER SECTION 536 OF THE CIVIL CODE OF CALIFORNIA, AS REENACTED IN 1905, TO USE THE STREETS OF THE CITY OF POMONA FOR ITS TELEPHONE SYSTEM WITHOUT A SPECIAL FRANCHISE THEREFOR FROM THE CITY.

Since the case at bar was decided by the Circuit Court of Appeals, there have been, as stated by appellants, several decisions of the Supreme Court of California, which directly and materially bear upon the construction of Section 536 of the Civil Code. That section, as originally enacted, on March 21, 1872, was as follows:

> "Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this

> State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

The contention of the appellee that the word "telegraph" in that section included "telephone", was based largely upon the decision of the Supreme Court of California in the case of *Davis v. Pacific Tel. & Tel. Co.,* 127 Cal. 312, decided December 26, 1899. In that case the Court, after reviewing a large number of the cases upon this subject, said:

> "The term 'telegraph' means any apparatus for transmitting messages by means of electric currents and signals, and embraces within its meaning the narrower word 'telephone'."

Accordingly, it decided that the word "telegraph" in Section 591 of the Penal Code of California, which made it a misdemeanor to maliciously injure a "telegraph" line, applied also to "telephone" lines. On October 27, 1911, the same Court, however, in deciding the case of *Sunset Telephone & Telegraph Co. et al. v. City of Pasadena et al.,* 118 Pacific 796, held that the word *"telegraph"* in Section 536 of the Civil Code did not include "telephone", and that the rights, extended to telegraph companies by that section, were not extended to telephone companies, until the repeal and reenactment of that section in 1905, *so as to expressly include telephone companies.*

Although we realize that this Court is not precluded, under the circumstances of this case, to wit, the assertion by the appellee of a contractual right, based upon the definition of the word "telegraph" in the *Davis* case—from examining this question and from deciding for itself, whether or not the word "telegraph" in Section 536 of the Civil Code of California, prior to the reenactment of that section in 1905, included "telephone", still we assume that, under the

settled rule of this Court, that even in a case, where it may exercise an independent judgment, "any reasonable doubt "will be resolved in favor of that construction of the state "statute which has been adopted by the Court of last resort "in that state" (*Yazoo etc. R. R. Co. v. Adams,* 181 U. S. 580, 583), the Court will accept the conclusion of the Supreme Court of California upon this point. We shall not, therefore, follow the appellants in their argument about the meaning of the word "telegraph" in Section 536, prior to its repeal and reenactment in 1905.

The decree of the Circuit Court of Appeals, reversing that of the Circuit Court, can, we think, be amply supported upon the grounds herein relied upon by the appellee, and independently of the construction that should be given the word "telegraph" in Section 536 of the Civil Code, prior to its reenactment in 1905.

In the Circuit Court, and in the Circuit Court of Appeals, the appellee relied upon certain transactions between the City and it, as constituting or creating a contract between it and the City, and under which it claimed the right to have its system in the City, without a special franchise from the City. This contention was resolved against the appellee both by the Circuit Court and by the Circuit Court of Appeals, and it will not be advanced upon this appeal.

The appellee, on this appeal, contends that it has the right to have its telephone system in the streets of Pomona, without a special franchise from the City, first, under the provisions of Section 536 of the Civil Code of California, as reenacted in 1905, and, second, under the provisions of Section 19 of Article XI of the State Constitution, as amended October 10, 1911.

The inquiry, in connection with Section 536, is, therefore, reduced to the proposition whether or not, since its repeal and reenactment in 1905, so as to expressly include telephone companies, it confers upon the appellee the right to use the streets of the City of Pomona for its telephone system, without a special franchise from the City.

1. SECTION 536 OF THE CIVIL CODE IS A GRANT OF RIGHT BY THE STATE TO TELEPHONE AND TELEGRAPH CORPORATIONS TO USE THE HIGHWAYS OF THE STATE FOR THEIR LINES.

As reenacted in 1905 Section 536 is as follows:

> "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters" (Stats. of Cal. 1905, pp. 491, 492).

Of the section as reenacted, the State Supreme Court in the case of *Western Union Telegraph Co. v. Hopkins,* 116 Pac. 557, at page 560, said:

> "This section has never been expressly repealed or amended in any particular except *by expressly extending the privileges therein granted to telephone corporations,* which was done in the year 1905 by a repeal of the section and its reenactment by the same Act in such form as to *expressly include telephone corporations.*"

In that case and in the cases of *Western Union Teleg. Co. v. Los Angeles Co.,* 116 Pac. 564; *Postal Teleg. Cable Co. v. Los Angeles Co.,* 116 Pac. 566, and in the *Pasadena* case, that Court decided that Section 536 is a grant to those telegraph and telephone companies, which accept its terms, of the right to use the highways of the State for their telegraph or telephone lines.

The cases of *Western Union Teleg. Co. v. Hopkins, Western Union Teleg. Co. v. Los Angeles Co.,* and *Postal Teleg. Cable Co. v. Los Angeles Co.,* involved the validity of cer-

tain assessments made upon the franchises of the telegraph companies to maintain and operate their telegraph systems in Los Angeles. The companies claimed that their franchises were derived from the Act of Congress of July 24, 1866, and were, therefore, not subject to assessment and taxation by the State of California (*San Francisco v. W. U. Tel. Co.*, 96 Cal. 140). The Supreme Court decided, however, that the franchises were derived from Section 536 of the Civil Code; that, as this section extended to those telegraph corporations, choosing to avail themselves of its privileges, the right to use the roads and highways of the State for their lines, the lines, of the telegraph companies constructed, maintained and operated under the authority of that section, were franchises subject to assessment and taxation by the State of California.

In the case of *Western Union Teleg. Co. v. Hopkins*, the Court said (116 Pac. 557, 564):

> "It follows from what we have said that plaintiff's exclusive occupation of portions of the streets of the City of Los Angeles without liability for compensation, to the extent at least to which its system was constructed therein at the time of the adoption of Section 536, Civil Code, and its right to such occupation free of charge by the City, are based solely on the last named section, *and that as to such occupation and right this section constitutes a grant in the nature of a franchise accepted by it*, constituting property located within this state and assessable in the County of Los Angeles."

It is settled that the word *"highways" in Section 536 includes the streets of cities and towns in California (Political Code*, Sec. 2618; *Western Union Teleg Co. v. Hopkins*, 116 Pac. 557-562; *Western Union Teleg. Co. v. Visalia*, 149 Cal. 744, 746; *Niles v. City of Los Angeles*, 125 Cal. 572, 576; *Smith v. San Luis Obispo*, 95 Cal. 463, 469).

The *Pasadena* case (118 Pac. 796) involved rights, similar to those claimed by the appellee in the case at bar. In that

case, referring to Section 536 of the Civil Code, the Court in (118 Pac. 796, 799) speaking of the construction, which it had given Section 536 in the case of *Western Union Teleg. Co. v. Hopkins,* said (118 Pac. 796, 799):

> "This construction makes the section a pure grant by the state of a franchise in its highways, one, as suggested by defendants, 'of incalculable value and importance'."

This construction, by the Supreme Court of California, that Section 536 is a pure grant by the State of a franchise in its highways, is in accord with the construction of similar statutes by the Courts of other States. So, in the case of *New Union Telephone Co. v. March,* 89 N. Y. S. 79, 81, the Supreme Court of New York said that, where the Transportation Corporations' law gives to a telephone corporation organized under it the

> "right to erect, construct and maintain the necessary fixtures for its lines upon, over or under any of the public roads, streets and highways within the limits of this state",
>
> "this is a franchise directly from the State to the corporation to use the public streets and highways of the State for the erection and maintenance of its lines."

In the case of *State ex rel. Wisconsin Teleph. Co. v. City of Sheboygan,* 86 N. W. 657, 660, the Supreme Court of Wisconsin said that

> "the power to exist as a corporation and to exercise the franchise of the use of the highways and streets, as against the public, was already possessed by the relator. The City had no power to add to or detract therefrom, except in the exercise of its police power. *The franchise existed by express legislative grant*" (italics ours).

See also:

Abbott et al. v. City of Duluth, 104 Fed. 833; id. 117 Fed. 137;

City of Duluth v. Duluth Telephone Co., 87 N. W. 1127;

Northwestern Telephone Exch. Co. v. City of Minneapolis, 86 N. W. 69;

City of Wichita v. Old Colony Trust Co., 132 Fed. 641;

City of Wichita v. Missouri & K. Telephone Co., 78 Pac. 886;

State ex rel. Rocky Mountain Bell Telephone Co. v. Mayor etc. of City of Red Lodge, 76 Pacific 758;

Chamberlain et al. v. Iowa Tel. Co., 93 N. W. Rep. 596;

State v. Nebraska Telephone Co., 103 N. W. 120;

State ex rel. Wisconsin Telephone Co. v. City of Sheboygan et al., 86 N. W. 657; 90 N. W. 441;

Michigan Telephone Co. v. City of Benton Harbor, 80 N. W. 386;

Farmer & Getz v. Columbiana Co. Telephone Co., 74 N. E. 1078;

Village of Carthage v. Central New York Telephone and Telegraph Co., 78 N. E. 165;

Garnett v. Independent Telephone Co. etc., 106 N. Y. S. 3;

City of Texarkana v. Southwestern Tel. & Tel. Co., 106 S. W. 915;

Missouri River Telephone Co. v. City of Mitchell, 116 N. W. 67;

Hodges v. West. Union Tel. Co., 18 So. 84.

An examination of the foregoing cases will reveal that the object of such legislation, as is contained in section 536, is to foster and promote the growth of telegraph and telephone systems. They are recognized as an important element

in the business and social life of the day. The policy of the law is to encourage their growth by a State grant of right to establish their systems in the highways of the State, including the streets of cities, and not to leave the question of their existence to the various subdivisions of the State.

2. SECTION 536 OF THE CIVIL CODE OF CALIFORNIA IS A GENERAL LAW OF THE STATE AND IS EFFECTIVE IN POMONA.

In the *Pasadena* case the Supreme Court of California decided, however, that Section 536 of the Civil Code conferred no right upon telegraph or telephone companies *so far as the streets of that city are concerned* (118 Pac. 796, 803). The Court so held, because Pasadena is organized under a freeholders' charter (Stats. of Cal. 1901, p. 884) and, according to Section 6 of Article XI of the State Constitution, cities organized under freeholders' charters are not subject to or controlled by general laws in "municipal affairs". The question, whether a telephone company, operating as a homogeneous whole a large interstate and intrastate telephone system, should have the right to use the streets of a particular city for its wires, so as to embrace such city within and make it a part of the general system, was in the *Pasadena* case held to be a "municipal affair", and, as the charter of Pasadena contains provisions which, the Court held, give the city the power to determine, whether and upon what terms, portions of its streets may be used and occupied by telegraph or telephone companies, these provisions were held to be controlling over Section 536. Parenthetically, it may be said that the Supreme Court of California has remarked that the words "municipal affairs" have not been susceptible of a satisfactory definition (*Pasadena* case, 118 Pac. 796, 803). One of the late Justices of the California Supreme Court speaks of them as "loose, indefinable, wild words" (*Ex parte Braun*, 141 Cal. 204, 214).

The conclusion of the Supreme Court, in the Pasadena case, that Section 536 confers no rights upon telegraph or telephone companies, so far as the streets of Pasadena are concerned, is, however, inapplicable to the City of Pomona. Pomona is a municipal corporation, organized as a city of the 5th class (Tr., pp. 25-26), under an Act of the Legislature of the State of California, entitled "An Act to provide "for the organization, incorporation and government of "municipal corporations", approved March 13, 1883 (Stats. of Cal. 1883, p. 93). This Act is known as the Municipal Corporation Act.

Prior to the adoption in 1879 of the new Constitution in California, municipal corporations were created by special acts of the Legislature. The Constitution of 1879, by Section 6 of Article XI, provided, however, that

> "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population of cities and towns, which laws may be altered, amended or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws."

It was in pursuance of this constitutional provision that the Municipal Corporation Act was passed.

Section 8 of Article XI of the Constitution provides for the organization of cities under freeholders' charters.

There are, therefore, in California three classes of cities, those organized under special acts of the Legislature, prior to the adoption of the present Constitution, in 1879, those

organized under the general Municipal Corporation Act and those organized under freeholders' charters.

The words "except in municipal affairs", in the last sentence of Section 6 of Article XI of the Constitution, were added by amendment in 1896. The reason for this was that, under the provision that all cities and towns and the charters thereof should be subject to and controlled by general laws, it was found that the charter provisions were being "frittered away" by general laws of the State (*Fragley v. Phelan,* 126 Cal. 383, 387). *The "municipal affair" provision does not, however, apply to cities and towns organized under the Municipal Corporation Act;* such cities and towns, being incorporated under a general law of the State, are, of course, subject to all general laws of the State. This proposition was clearly pointed out by the State Supreme Court in the case of *Ex parte Helm,* 143 Cal. 553, in which, at page 556, the Court said:

> "from the nature of things, it (this amendment) could not apply to cities and towns existing under the General Municipal Corporation Act, which was adopted by the legislature, and, by express provision of the same section of the constitution, is subject to alteration, amendment and repeal by the legislature. Such cities and towns have always been and still are necessarily subject to and controlled by general laws, in the sense that general laws applicable to them may be altered, amended or repealed by the legislature at its own pleasure, and new general laws in regard to them enacted, subject always to the limitation that the legislature must not enact 'special laws' in regard thereto."

Similarly, the California Appellate Court, in the case of *Dawson v. Superior Court,* 13 Cal. App. 582, 583, in discussing this subject, and in referring to the *Helm* case, said that, it was decided in that case that

> "but two classes of municipal corporations are relieved from the control of general law in municipal

affairs, these being those cities organized by special legislative charter prior to the adoption of the Constitution of 1879, and cities operating under what is denominated a freeholders' charter; that other cities organized and operated under the municipal corporations act are subject and subordinate to general laws even in municipal affairs".

Section 536 of the Civil Code, as reenacted in 1905, is, therefore, clearly operative as a grant to telegraph and telephone companies in all municipalities of the State, organized under the Municipal Corporation Act, of which Pomona is one.

It may, we think, be fairly said that the appellants recognize the force of this position, for they seek to combat it only by arguing that, except as to telegraph and telephone lines doing an interstate business, Section 536 has been repealed by the so-called Franchise Act of 1905. That there has been no such repeal, is, we think, evident from the following considerations.

3. Section 536 Was Not Repealed by the Franchise Act of 1905 (Stats. of Cal. 1905, p. 777).

The appellants contend that the Franchise Act of 1905 (Stats. of Cal. 1905, p. 777), repealed by implication, except as to telegraph or telephone lines doing an interstate business, the direct grant to telephone and telegraph corporations, contained in Section 536. This contention proceeds upon the assumption, that Section 1 of the Franchise Act of 1905 contains provisions inconsistent with those of Section 536; and that, because that act was passed two days after the re-enactment of Section 536, it operated to repeal Section 536.

a. *The provisions of the Franchise Act of 1905 are not inconsistent with those of Section 536 of the Civil Code, as re-enacted in 1905, because Section 536 is a grant of fran-*

chise, and the Franchise Act of 1905 only provides the method by which franchises must be granted; it contains no delegation of power to grant franchises.

It follows from an elementary proposition, of course, that, inasmuch as the Franchise Act of 1905 contains no language directly repealing Section 536 of the Civil Code, as reenacted in 1905, and, as any repeal of Section 536 could have been by implication only, such appeal will not be held to have taken place, unless there is an "irreconcilable conflict" between the two statutes.

Supervisors v. Lackawanna, etc., 93 U. S. 619, 624.

But, there is no conflict whatever between Section 536 and the 1905 Franchise Act.

It has been shown that Section 536 of the Civil Code is a direct grant to telegraph and telephone companies of the right to use, for their lines, all of the highways of the State, while the Franchise Act of 1905 only provides the method, by which the governing boards of cities and counties must grant those franchises, which they *may have the power to grant.*

The Supreme Court of California, in the *Pasadena* case, speaking of the 1905 Franchise Act, said:

> *"Its whole purpose was to prescribe the method and conditions upon which the franchises included within its terms* MIGHT *be granted by the legislative body authorized by law to make the grant"* (118 Pac. 796, 799).

To contend that the Board of Trustees of the City of Pomona has the power to grant or refuse a franchise, such as that here under consideration, is to assume that such power is delegated to the Board by the Franchise Act of 1905 for, it is not claimed by the appellants that there is any other statute in the State of California granting such a power to the class of municipalities to which Pomona belongs.

The power to grant franchises, for the use of the highways in a city, inheres, of course, in the State. The Supreme Court of California in the case of *In re Johnston,* 137 Cal. 115, at page 122, said:

> "The highways of a state, including the streets in its cities, are under the control of the people of the state."

And in the case of *Thomason v. Ruggles,* 69 Cal. 465, that Court said:

> "A municipality has no control over a highway unless the right of control has been vested by the State in the municipality."

See, also,

South Pasadena v. L. A. T. Ry. Co., 109 Cal. 315.

The delegation to a municipal corporation of the power to grant franchises must clearly appear, before the right to exercise the power may be asserted. Any reasonable doubt, concerning the existence of the power, is to be resolved against the municipal corporation.

See:

Von Schmidt v. Widber, 105 Cal. 151;
Glass v. Ashbury, 49 Cal. 571;
State ex rel. Wisconsin Tel. Co. v. Sheboygan, 86 N. W. 657, 661;
Los Angeles City Water Co. v. Los Angeles, 88 Fed., 720.

The Franchise Act of 1905 contains no delegation, either *express or implied,* of any power to grant; it simply declares that

> "every franchise or privilege to erect or lay telegraph or telephone wires * * * *hereafter proposed to be granted by Boards of Supervisors, Boards*

> *of Trustees* * * * shall be granted upon the conditions in this act provided, and not otherwise".

The act provides, as the State Supreme Court pointed out in the *Pasadena* case, solely, for the procedure to be followed in granting *such franchises, as municipalities or counties may have the power to grant.*

The Act does not provide that a telegraph or telephone corporation *must* apply to the governing or legislative body of any municipality within the State for a franchise to use its streets or highways for telegraph or telephone lines; that right is extended to those companies by Section 536 of the Civil Code. To give the act the effect for which the appellants are contending, is to supply it with a provision, which it does not contain.

Pereria v. Wallace, 129 Cal. 397, is cited by appellants in aid of their position, that the Franchise Act of 1905 is inconsistent with Section 536 of the Civil Code. But the case cited is not authority for the contention made. In that case, it was held that Section 19 of Article XI of the State Constitution, prior to its amendment in 1911, and which extends to water companies the right to use the streets of municipalities, without a franchise therefor from the municipalities, was inconsistent with the *assumption* of the right claimed by the City, under the Franchise Act of 1897, to grant or withhold the franchise. But, it was not determined in that case whether, under the provisions of the Franchise Act of 1897, read by themselves, cities *were given the power* to grant any franchise for any purpose.

This construction of the Act, that it refers only to franchises, which the governing body of the county or municipality has power to grant, is emphasized by the qualifying phrase "hereafter proposed to be granted" in the first section of the Act. Obviously, the governing or legislative body could not propose to grant a franchise, which it has not the power to grant.

But, it is suggested by appellants that the expression "hereafter proposed to be granted by Boards of Supervisors, etc.", contained in Section 1 of the Act, relates solely to its immediate antecedent, "other privilege," and not to the other antecedents, in which are enumerated particular franchises, or privileges, to do certain acts on the public highways. From this, it is concluded that the words, "every franchise or privilege to erect or lay telegraph or telephone wires," being unqualified, can only "be granted upon the conditions in this act provided and not otherwise." But the premise, upon which that conclusion is based, is erroneous.

It is true, that a rule of construction is to be found to the effect, that a qualifying clause is ordinarily to be confined, in its operation, to its immediate antecedent. But this rule

> "does not apply where a consideration of the subject matter requires a different construction."
>
> *Greenough v. Phœnix Ins. Co.,* (Mass.) 92 N. E. 447, 449.

And

> "the rule is that a qualifying clause following several clauses may be applied to all of them, if applicable, or to the last one, as best accords with the purpose and spirit of the act."
>
> *State v. Louisville & N. R. Co.,* (Miss.) 53 So. 454, 455.

It is clear that the expression "hereafter proposed to be granted by Boards of Supervisors," etc., modifies not only its immediate antecedent, "other privilege," but also each of the franchises or privileges in Section 1, specifically named. The section reads:

> "Every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads upon any public

> street or highway * * * or to exercise any other privilege whatever hereafter proposed to be granted by Boards of Supervisors, * * * shall be granted upon the conditions in this act provided, and not otherwise."

No reason has been suggested for holding that the expression, "hereafter proposed to be granted by boards of supervisors," etc., qualifies those franchises and privileges only, which may be included within the meaning of its last antecedent, "other privilege," and not all of *the same kinds of franchises and privileges,* which are specifically named in the Act. On the contrary, under the familiar maxim, *"ejusdem generis,"* the expression, "to exercise any *other* privilege," refers, we submit, to "any other privilege" of a *like character* with those particularly named in the earlier provisions of the section. Besides, section 2 of the act provides for the publication of the application for any of the franchises or privileges, mentioned in section 1, with a statement "that it is proposed to grant the same" and section 3 provides that "the publication must state the character of the franchise or privilege proposed to be granted (Stat. of Cal. 1905, p. 777). It is manifest, therefore, we submit, that the phrase "hereafter proposed to be granted" qualifies every franchise or privilege mentioned in the first section of the Act.

This construction of the Act, moreover, is the one given it by the Supreme Court of California. In the case of *Los Angeles v. Davidson,* 150 Cal. 59, that Court, in stating the similar provisions of the Act of 1901, said that the Act declares

> "that every *franchise to construct or operate a street railroad upon any street or highway hereafter proposed to be granted by Boards of Supervisors,* Boards of Trustees, or other governing or legislative bodies of any city and county, city or town, within the State shall be granted upon the conditions in this act provided, and not otherwise."

From this extract, it is clear that in the opinion of the State Supreme Court the expression, "hereafter proposed to be granted," etc., qualifies each of the franchises or privileges specially mentioned in the Act, as well as its immediate antecedent, "other privilege."

Neither the Board of Trustees of the City of Pomona, however, nor that of any city in the State of California, organized under the provisions of the Municipal Corporation Act, has the power to grant a franchise to a telegraph or telephone company, and there is no law of the State of California which makes it obligatory upon such companies to apply to such municipalities for a franchise; on the contrary, by Section 536, a grant of franchise is extended to them in such municipalities.

Just what conclusion the appellants seek to draw from the fact, which they assert (Brief, pp. 94, 95), that franchises to operate telephone systems were, prior to 1905, granted by municipalities, is not entirely clear. Without entering upon a discussion of this subject, but assuming that, prior to 1905, telephone companies did secure franchises from municipalities for the use by their telephone systems of the streets of municipalities, still, we submit, it is obvious that the Legislature, by the repeal and re-enactment of Section 536 in 1905, so as to expressly include telephone companies, intended thereby to extend to such companies the same privilege in this connection which had theretofore been extended to telegraph companies. Appellants do not deny, and, in view of the decisions of the State Supreme Court in the cases of *Western Union Tel. Co. v. Hopkins,* 116 Pac. 557, *Western Union Tel. Co. v. Los Angeles,* id. 564, *Postal Telegraph-Cable Co. v. Los Angeles,* id. 566, *and the Pasadena* case, 118 Pac. 796, they cannot deny that Section 536, prior to 1905, extended to telegraph companies the right in question, and that such companies were not obliged to secure a special franchise from each municipality in which they desired to operate, and that since 1905, unless the section

has been repealed, the same right is extended thereby to telephone companies.

On page 89 of their Brief appellants say there was a "significant omission," when the Legislature in 1901 amended the various sections of the Codes of California relating to "telegraph" companies, by adding the word "telephone," but did not so amend Section 536 of the Civil Code. If that omission was significant in 1901, then, we submit, of equal, if not greater, significance was the reenactment of Section 536 in 1905, so as to expressly include telephone companies.

Without speculating upon the purpose of the Legislature in extending the rights to telephone companies that had, prior to 1905, been accorded to telegraph companies by Section 536, it is safe to assume that, by the express inclusion of telephone companies within that section by its reenactment in 1905, the Legislature intended to secure for these enterprises the right to construct their systems in the municipalities of the State, without leaving the question of their existence subject to the whim, or caprice, of the governing board of any particular municipality. It is true that the State Supreme Court has by its decision in the *Pasadena* case narrowed the operation of Section 536 to those cities in California which are not organized under freeholders' or special charters, having provisions inconsistent with Section 536; but, as to all such other cities, and of which Pomona is one, it has, we submit, decided that Section 536 is operative.

The appellants say that, because the 1905 Franchise Act contains a complete scheme, relative to the granting of franchises in their streets by cities and counties, that fact argues for a repeal of Section 536 (Brief, pp. 96, 97). The general rule, invoked in this behalf, is that, where a later statute deals with the same subject matter as does an earlier one, and in such way as to indicate that the law-makers intended the later act to be a substitute for the earlier one, the

prior statute is held to have been repealed. But, as has been shown, the 1905 Franchise Act does not deal with the same subject matter as does Section 536. Besides, the rule, here invoked by appellants, is without application, for the reason that the Legislature of California, by providing in Section 11 of the Franchise Act that

> "all acts, or parts of acts, *in conflict herewith,* are hereby repealed,"

has thereby implied

> "very strongly that there may be acts on the same subject which are *not* thereby repealed."
> *Hess v. Reynolds,* 113 U. S. 73, 79.

By so providing, the Legislature, in passing the later act,

> "had the question of repeal under consideration, and gave expression to the *extent* of its intention in that regard in Section" eleven "of the act, which shows the repeal of the former acts only to be 'in so far as they are inconsistent' with the provisions of the later Act." (Italics by the Court.)
> *Bank v. Cahn,* 79 Cal. 463, 465.

As said by Field, Circuit Justice, in *Patterson v. Tatum,* 18 Fed. Cas. pp. 1331, 1333,

> "The implication" of repeal "cannot arise when the revisory statute itself prescribes its operation upon the previous act; when that is done no other effect can be given to the revisory act."

Appellants also claim that the position of the appellee, if sustained, would

> "place the Legislature in the absurd position of enacting a sweeping law upon the subject of granting telephone franchises when the law had no application to such franchises" (Brief, p. 102).

The rule is, of course, that absurd consequences are to be avoided, if possible, in construing statutes. But this rule

is inapplicable here, because the provisions of Section 1 of the franchise Act of 1905, relating to the granting of the telephone franchises therein mentioned, may be given full effect and are operative in all cities of the State which have the power to grant such franchises, such as, for instance, the City of Pasadena. The City of Pomona, however, does not fall within this class, and as to it, and all other similar cities in the State, the franchise, extended by Section 536, may be exercised by a telephone or telegraph company seeking to avail itself of it. Besides, it is to be noted that the Franchise Act of 1905 is as "sweeping" upon the subject of granting telegraph franchises as it is upon the subject of granting telephone franchises. In view of the decisions of the State Supreme Court in the *Western Union Telegraph Company* cases, in the *Postal Telegraph-Cable Company* case, and in the *Pasadena* case, hereinbefore referred to, the appellants could not, however, and do not, contend that the 1905 Franchise Act supersedes Section 536, so far as telegraph companies are concerned, and if it does not supersede that section so far as telegraph companies are concerned, it certainly does not as to telephone companies.

Appellants also suggest that, because in Section 11 of the 1905 Franchise Act, it is also declared that that act shall not be construed as repealing certain other acts therein mentioned, this fact indicates that the Legislature was of opinion, that the 1905 Franchise Act "would have the ef- " fect of wiping out prior legislation upon the subject with " which it dealt" (Brief, page 97). This conclusion is also based on the erroneous premise that the *two statutes deal with the same subject.* The acts, mentioned in Section 11 of the 1905 Franchise Act, and which are to be found on pages 46 and 191 of the California Statutes of 1897, confer upon municipalities the power to grant franchises in their streets for particular purposes, and expressly provide that these franchises are to be granted only upon certain conditions. These conditions differ from those upon which

franchises are required to be granted, under the Act of 1905, and the acts, providing for them, would, of course, in the absence of the foregoing saving clause in the 1905 Act, have been repealed.

From the foregoing considerations, we submit, it follows that there is no conflict between Section 536, as reenacted in 1905, and the 1905 Franchise Act.

b. Any repeal of Section 536 of the Civil Code by the Franchise Act of 1905 could have been only by implication. Such repeals are not favored and occur only in cases of clear and irreconcilable conflict.

It is not contended that the Franchise Act of 1905 directly repeals Section 536. If there is a repeal, it is only by implication. But such repeals are not favored, and are considered as occurring, only when there is a clear and irreconcilable conflict between the earlier and the later statute.

> *"Repeals by implication are not favored."*
> *United States v. Morgan* (decided December 11, 1911), 32 Sup. Court Rep. 81, 82.

And such repeal

> "is held to occur only where different statutes cover the same ground, and there is a clear irreconcilable conflict between the earlier and the later. The rule, as thus stated, is so well settled, that discussion and the citation of authorities are unnecessary."
> *Supervisors v. Lackawanna etc.*, 93 U. S. 619, 624.

See, also:

Wood v. U. S., 16 Pet. 341, 362;
The Distilled Spirits, 11 Wall. 356, 365;
Henderson's Tobacco, 11 Wall. 652;
Arthur v. Homer, 96 U. S. 137, 140;
Chew Heong v. U. S., 112 U. S. 536, 549;
Frost v. Wenie, 157 U. S. 46, 58.

U. S. v. Greathouse, 166 U. S. 601, 605;
Cope v. Cope, 137 U. S. 682, 686;
Wetzell v. City of Paducah, 117 Fed. 647;
Merrill v. Gorham, 6 Cal. 41;
Soher v. Supervisors, 39 Cal. 134;
Malone v. Bosch, 104 Cal. 680, 683;
Banks v. Yolo Co., 104 Cal. 238;
Thompson v. Supervisors, 111 Cal. 553, 556;
Hilton v. Curry, 124 Cal. 84;
Rowe v. Hibernia Sav. & L. Soc., 134 Cal. 403, 406.

c. Section 536 of the Civil Code was reenacted at the same session of the Legislature and at about the same time that the Franchise Act of 1905 was passed. This circumstance is a strong argument against the repeal by implication of the former by the latter.

Section 536 of the Civil Code was reenacted at the same session of the California Legislature, at which the 1905 Franchise Act was passed. The Act repealing and reenacting Section 536 was approved March 20, 1905 (Stats. of Cal. 1905, p. 492) and the Franchise Act was approved March 22, 1905 (id. p. 777). The fact, that two days only elapsed between the enactment of the two statutes, renders it almost conclusive that there was no intention upon the part of the Legislature to repeal the former by the latter.

> "When two acts are passed at the same session of the Legislature, the presumption is strong against implied repeal and effect must be given to each, if possible."
>
> *State v. Board of Commissioners,* (Ind.) 85 N. E. 513, 522.

> "And the presumption against an implied repeal is stronger when the provisions apparently conflicting were enacted at about the same time."
>
> *State v. Hindson,* (Mont.) 106 Pac. 362, 364.

"The fact that they were passed by the same Legislature, and so nearly together, creates a strong presumption that no conflict was supposed to exist."

State v. Duncan, (Ala.) 50 So. 265, 266.

"Here there is no reason for inferring an intent to change the law. On the contrary, the fact that the acts were passed at the same session, within four days of each other, bears strongly in the other direction."

Stubblefield v. Menzies, 11 Fed. 268, 276.

d. *The Circuit Court erred in concluding that Section 536 of the Civil Code was repealed by the Franchise Act of 1905. Judge Gilbert, in his Dissenting Opinion in the Circuit Court of Appeals, did not follow that conclusion.*

The Circuit Court was of opinion that the Franchise Act of 1905, by implication, repealed Section 536 of the Civil Code as reenacted in 1905. The Court said of that Act:

"Its provisions are certainly incompatible with the acquisition of the franchise under Section 536 of the Civil Code, and, therefore, said act must be held to have repealed said section." (164 Fed. 577; Tr. p. 127.)

It is not shown in the opinion, however, wherein the provisions of the two statutes are incompatible. We submit, on the other hand, that we have shown that there is no inconsistency between them and that both may stand.

The only authority cited by the Circuit Court in support of its conclusion upon this point is *Northwestern Telephone Exchange Co. v. St. Charles,* 154 Fed. 386. But that case does not support the conclusion for which it is cited. There the Telephone Exchange Company was incorporated in December, 1878, and was exercising privileges extended to telegraph and telephone corporations under a statute of the State, to all intents and purposes the same as Section 536 of the Civil Code. In 1881 the Legislature of Minnesota

amended this statute so as to make the same applicable in terms also to telephone corporations. On April 19, 1893, an Act was passed to the effect that

> "No corporation formed under this title shall have the right to construct, maintain or operate upon or within any street, alley or other highway of any city or village, any improvement of whatsoever nature or kind, *without first obtaining a franchise therefor from such city or village according to the terms of its charter,* and without first making just compensation therefor, as herein provided."

And, again, on April 13, 1901, the Legislature of Minnesota passed another Act, to the effect that

> "Nothing herein shall be construed to grant to any person, persons, associations or corporation, any rights for the maintenance of a telephone system within the corporate limits of any city or village in this State, *until such person, persons, associations or corporation shall have obtained the right to maintain such system in such village or city,* nor for a period beyond that for which the right to operate such system is granted by such city or village."

It was held that these later acts repealed the statute of the State similar to Section 536 of the Civil Code of California.

Of course, in the *St. Charles* case, inasmuch as the later enactments declared, in terms, that no one could acquire any right, under the earlier statute, to use the streets of any city, without obtaining a franchise therefor from the city, the conclusion was obvious that, after the subsequent enactments, no franchise, in cities, for the purposes named was granted by the earlier act. But, clearly, this ruling is without application to the statutes here under consideration. The 1905 Franchise Act neither contains any delegation of the power to cities to grant franchises in its streets, nor does it provide, either expressly, or impliedly, that the franchise conferred by Section 536 of the Civil Code shall be depend-

ent, for its existence, upon the will of the governing board of any subdivision of the State.

The Circuit Court of Appeals disposed of the appeal in favor of the appellee upon the sole ground that, before the re-enactment in 1905 of Section 536 of the Civil Code, that section, properly construed, contained a grant to telephone companies as well as to telegraph companies. The Court did not find it necessary to discuss the 1905 Franchise Act, because the other ground was sufficient, in its opinion, to require a reversal.

In his dissenting opinion, Circuit Judge Gilbert considered, solely, the ground upon which the majority of the Court based its judgment of reversal. True, at the end of his opinion, Judge Gilbert said:

> "I think that the opinion of the Court below correctly disposes of the questions of law involved in the case." (172 Fed., p. 840; Tr. p. 359.)

The language quoted is deemed sufficient to justify appellants in saying that the judge who dissented in the Circuit Court of Appeals agreed with the judge of the Circuit Court, in the latter's view that Section 536, as re-enacted in 1905, was repealed by the 1905 Franchise Act. It is submitted, however, that it is clear, from a reading of Judge Gilbert's opinion, that the only matter which the judge had in mind, in making the statement quoted, was that the Circuit Court did not err in holding that, prior to its re-enactment in 1905, Section 536 did not apply to telephone companies.

Finally, upon this point, we may, perhaps, in view of the reference by appellants, on page 102 of their Brief, to the position of the appellee in the various cases, involving the questions under consideration, be permitted to say that, in the *Pasadena* case, the question of the repeal of Section 536 of the Civil Code by the Franchise Act of 1905 was

argued in the State Supreme Court by both parties through the same counsel as appear in the case at bar.

The question was before the Court for decision in that case, and, had it been decided in accordance with the contention of the appellants, it would have disposed of the whole case. It was, however, not decided, and, we submit, under the circumstances, it is proper to infer that the Supreme Court of California was in no wise of the opinion that the repeal for which appellants are contending has taken place.

It is respectfully submitted, that the direct grant, by the State of California in Section 536 of the Civil Code, to telephone companies of the right to use the roads and highways of the State, has not been repealed, and that the appellee, clearly, under the provisions of that section, has the right to have its system in the streets of the City of Pomona, without a special franchise from the City.

4. APPELLANTS CONCEDE THAT, UNDER SECTION 536 OF THE CIVIL CODE, AS RE-ENACTED IN 1905, TELEPHONE LINES DOING AN INTERSTATE BUSINESS ARE ENTITLED TO USE THE HIGHWAYS OF THE STATE, INCLUDING THE STREETS OF POMONA. THE LINES OF THE APPELLEE IN POMONA ARE PART OF A HOMOGENEOUS INTERSTATE TELEPHONE SYSTEM OPERATED BY THE APPELLEE AND EXTENDING THROUGHOUT THE STATE OF CALIFORNIA AND IN THE STATES OF NEVADA, WASHINGTON AND OREGON.

Following the conclusion of the Circuit Court in this respect, the appellants contend that the rights, extended to telephone and telegraph corporations by Section 536 of the Civil Code, as re-enacted in 1905, are restricted by the Franchise Act of 1905 to telegraph and telephone corporations doing an interstate business. Such corporations, it is conceded, may exercise the rights extended by that section.

But, the appellants contend that the lines of the appellee in Pomona are not interstate telephone lines doing an interstate telephone business. The inquiry in this connection, therefore, is, are the lines of the appellee in Pomona an integral and component part of the general interstate telephone system operated by the appellee in the States of California, Washington, Oregon and Nevada and doing an interstate business?

The Circuit Court did not decide that the appellee has no lines in Pomona doing an interstate telephone business. To the very contrary, the fair inference from the opinion of that Court, is that it recognized that the appellee has lines in Pomona doing such business. In the course of its opinion the Court said:

> "While there is no dispute but that the City of Pomona removed from its streets some of complainant's poles and wires, yet I think from all the evidence in the case, that the only poles and wires which said City removed, and certainly all it threatened to remove, as shown by the resolution of its Board of Trustees of August 1st, 1905, and the Street Superintendent's notice pursuant thereto, exhibits 3 and 4 to complainant's bill, *are those which complainant used in its local and intrastate business,* and these, as I have already indicated, are not protected by said Act of Congress" (Tr., p. 127. Italics ours).
>
> "So that said section" (C. C. 536), "as it now stands, does not grant to a telephone company any right to maintain in a street poles and *wires used in local or intrastate business,* and, as I have already shown, *these are the only lines with which the City of Pomona threatens to interfere*" (Tr. p. 137. Italics ours).
>
> "As complainant is unlawfully maintaining *its intrastate and local lines* in the streets of Pomona" etc. (Tr. p. 139. Italics ours).

These extracts from the opinion of the Circuit Court make it evident, we submit, that that Court recognized

that the appellee has in Pomona interstate telephone lines, doing an interstate telephone business.

That the lines of the appellee in Pomona are an essential, component and integral part of its general interstate telephone system and do an interstate telephone business, is, we submit, conclusively shown by the averments of the bill and by the affidavits filed on behalf of the appellee.

It is alleged in the bill of complaint that the appellee has constructed and established, and now maintains and operates, extensive telephone and telegraph lines and systems and apparatus and appliances, for the purpose of transmitting intelligence by electricity through means of telegraph and telephone instruments in the States of California, Oregon, Washington, Idaho and Nevada, and that the principal place of business of the said corporation is in the Town of Martinez, County of Contra Costa, State of California (Tr. p. 3). It is further alleged, in this behalf:

> "That * * * now and for many years last past in the transaction of its said business and as a part thereof and by use of its said systems, your orator transmits and delivers by means of its said lines * * * and telephonic instruments and apparatus connected therewith, * * * communications originaating at points and places outside of said State of California and transmitted by and over its said lines to points and places within said City of Pomona, and to other points and places within said State; and also in like manner and by like means transmits like * * * communications originating at points and places within said City of Pomona and at other points and places within said State of California to points and places outside of said State; and also by said lines and like means, instruments and appliances, transmits and delivers * * * communications originating within the said City of Pomona and at other points within the State of California, to other places within said State" (Tr. p. 3).
>
> "That your orator does now operate and maintain and for more than ten years last past has, by

and with the consent and acquiescence of the said City of Pomona, operated and maintained about four hundred telephones in the said City; there is one telephone exchange and public office of your orator operated and maintained in said City; *each one of said telephones is connected with the entire system of your orator as hereinbefore set forth, and messages are and can be transmitted from each and any one of said telephones over the wires and lines of your orator to any other telephone in the said City of Pomona, or in the State of California, and to many points and places in the States of Oregon, Washington, Idaho and Nevada, upon the said lines and instrumentalities so as aforesaid owned and operated by your orator*" (Tr. p. 7).

H. Keyser, in his affidavit, stated that he was, and for several years last past had been, the appellee's Manager in Los Angeles County. He stated:

> "That prior to the 1st day of September, 1905, the complainant had about four hundred subscribers, each having a telephone, connected with the telephone exchange of the complainant in the City of Pomona. That each one of said telephones is connected with the entire system of the complainant and messages are and can be transmitted from each and any one of said telephones over the wires and lines of the complainant to any other telephone in the City of Pomona or in the State of California and to many points and places in the States of Oregon, Washington and Nevada, upon the lines and instrumentalities of the complainant" (Tr. p. 150).

E. S. Pillsbury, the General Counsel of the appellee, in an affidavit filed on behalf of appellee, said:

> "That said Sunset Telephone and Telegraph Company operates a telephone * * * system in the States of California, Washington, Oregon and Nevada, and in many of the cities and towns of each of said States" (Tr., p. 152).

To the same effect is the affidavit of C. J. Corcoran, for seven years Superintendent of the Construction Department of the appellee (Tr., p. 143).

G. P. Robinson, the Traffic Manager of appellee, in his affidavit stated that

> "The complainant operates and maintains in its various exchanges in the State of California and in the States of Oregon, Washington and Nevada about 133,553 miles of wire. The said complainant has in use at the said exchanges about 138,741 telephones. The said complainant has 1,283 offices in the said States, of which offices 451 are designated as exchange or gathering stations. The said complainant has in use and is operating and maintaining in its said system 100,486 poles. The said complainant operates and maintains in its said system in the said States 35,054 miles of long distance or toll wires, that is to say, wires over which messages by telegraph and conversations by telephone are sent between points separated from each other by long distances. *The entire system of the said complainant in all of the said States is connected so that any subscribers in any city or town or place in any one of said States can and do talk with any other subscriber in any other city or town or place in any other State*" (Tr., pp. 158, 159).

He also stated that all telephone messages from any point on the system of the appellee to any other point on the system of the appellee in California, or in Washington, or in Oregon, or in Nevada, or from any point in any of said States to any other point in any of said States, are charged and paid for according to a regular schedule of rates for conversations by telephone, established and printed in regular book form by appellee, the latest of said books, when said affidavit was made, having been issued March 1, 1903, and that in said book the City of Pomona regularly appeared, *and from said book it could be and is regularly determined at what rates or charges a telephonic conversation could be*

had from Pomona to any other point or place in California, or to any point or place in Oregon, Washington or Nevada, reached by the lines of appellee (Tr., p. 160). To the same effect is the affidavit of L. Glass (Tr., pp. 168, 169).

Frank Smith, in his affidavit, stated that for more than three years past he had been the agent of appellee at Pomona. He stated that

> *"The complainant has now about three hundred and thirty local subscribers in said City; each of said subscribers rents a telephone instrument from the complainant; each of said instruments is connected by means of wires directly with the telephone exchange of the complainant in said City; by means of said wires and instruments telephone conversations are carried on between the said subscribers in said City and by the said subscribers with persons at other places in the State of California, and with persons at places in the States of Oregon, Washington and Nevada"* (Tr. p. 161).

He further stated:

> *"It is not true that the poles and wires removed by the Superintendent of Streets of the said City of Pomona, belonging to the complainant, were those used for purely local telephonic purposes.* On the contrary, messages originating at other points within the State of California and at points without the State of California were being sent over said lines; and in this connection I state *that a particular message had been sent over one of the said lines from the said City of Pomona to Carson City, Nevada, the day before the said line was cut by the said Street Superintendent and by the said Loucks, and further, on August* 31, 1905, *the day previous to the time when said lines were cut by the said Slanker and Loucks, a conversation was had over one of said lines from Reno, in the State of Nevada, with a Subscriber of the complainant in the City of Pomona"* (Tr. pp. 164, 165).

See also the affidavit of E. J. Zimmer (Tr. p. 174). In his second affidavit Smith said:

> "Ever since I have been Manager of the complainant in the said City of Pomona, that is to say, since the month of December, 1902, *subscribers of the complainant in said City of Pomona have, at various times, held conversations from their places of residence or places of business, by means of the telephone instrument of the complainant and by means of the telephone and telegraph system of the complainant, with persons at other points in the State of California and in the States of Oregon, Washington and Nevada*" (Tr. pp. 186, 187).

We submit, this showing proves that the appellee does an interstate telephone business to and from Pomona, that every one of its subscribers there is connected through its central office there, with its entire system in California, Washington, Oregon and Nevada, that they do, and every one of them can, from his home or business, wherever his telephone may happen to be, through the said central office, hold a conversation by telephone entirely over the lines of the appellee, with subscribers or other persons using the telephones of the appellee in other parts of California and in Oregon, Washington and Nevada; that the system and lines of the appellee are not to be segregated and divided into local and intrastate lines as distinguished from interstate lines; that it has no essentially local or intrastate lines, but that all of its lines are part of a system over which an intrastate and interstate telephone business alike is done.

Upon this subject the Circuit Court of Appeals said:

> "In effect, the court below treated the appellant's telephone system as if it constituted two separate and distinct systems—one interstate and the other intrastate. In our opinion there is no valid ground for such a view. The appellant's poles and wires were erected under and by virtue of a charter which empowered it to transact an interstate telephone business.

> That such companies, like telegraph companies, are important agencies in the transaction of interstate commerce, is well settled. Muskogee Nat. Tel. Co. v. Hall, 118 Fed. 382; 55 C. C. A. 208; Southern Bell Telephone & Telegraph Co. v. Richmond (C. C.) 78 Fed. 858, and cases there cited. Each pole and wire erected formed an integral part of that system, just as each rail and tie of an interstate railroad constitutes an integral part of its system; and if there be any statute conferring upon the appellant as an interstate telephone company the right to construct and maintain its poles and wires in the streets of the City of Pomona (subject, of course, to the proper exercise of the police power of the city), we do not understand that any of them can be legally cut down or destroyed by municipal authority. The main question in the case, therefore, is, we think, whether there was any statutory authority for the erection and maintenance in the streets of Pomona of the appellant's poles and wires" (172 Fed. 832; Tr., pp. 349, 350).

In this connection, we also call to the attention of the Court, that in the *Pasadena* case, the Supreme Court of California, in speaking of the extent of appellee's system said (118 Pac. 796, 797):

> " 'Throughout the state of California, and in its various cities and towns, the said plaintiff has installed a similar system for both local and long distance use, serving its subscribers with about 195,000 telephones. It has likewise installed in the states of Oregon, Washington, Montana, Idaho, and Nevada, a system for local and long distance service, having in those states an aggregate of about 135,000 telephones for its subscribers. *The entire system in California and the other states is connected, forming a homogeneous whole.'* It may be assumed for the purposes of this case that plaintiff's lines in Pasadena have always been used in the conduct of an interstate telephone business" (italics ours).

Aside from the assumption, by the Supreme Court of California, in that case, that the lines of the appellee in

Pasadena had always been used in the conduct of an interstate business, it is to be noted that, without that assumption, the judgment in that case must necessarily have been reversed. For, in that case, an ordinance imposing a semi-annual charge of 75 cents on each pole of a telephone line *doing an interstate business*, without a franchise from the city, was upheld as against the appellee. This conclusion manifestly could have been, and was only, upon the ground that the lines of the appellee were engaged in doing an interstate telephone business.

Appellant's argue that the appellee does no interstate telephone business at Pomona, because, they say, "the interstate use was a negligible quantity" (Brief, p. 110). Assuming that the volume of interstate business at Pomona is small, still, we submit, the quantity of the interstate business does not determine its character. The question, whether or not the appellee does an interstate business at Pomona, is entirely independent of the consideration how much of that kind of business it does. As well might it be urged that, because from some station at the end of a branch line of some interstate transcontinental railroad system, the number of interstate passengers or interstate shipments of freight are small, therefore no interstate business is done from that point, and it is not a part of the interstate railroad. To state such a proposition is, we believe, to demonstrate its fallacy. And as in the case of an interstate railroad system every point on that system is a part of it, irrespective of the extent or quantity of the interstate business done from it, so, we submit, Pomona is a part of the interstate telephone system of the appellee extending throughout the State of California and into many parts of the States of Nevada, Oregon and Washington.

Similarly, it has been held that, under the Interstate Commerce and the Safety Appliance Acts, one interstate shipment, or car, is sufficient to bring a road wholly within the State, and having no traffic or operating connections with any other road, within the provisions of either of those acts.

See:

United States v. Southern Ry. Co., 164 Fed. 347, 349;

United States v. Pittsburg etc. Ry. Co., 143 Fed. 360;

United States v. Northern Pac. Terminal Co., 144 Fed. 861;

United States v. Great Northern Ry. Co., 145 Fed. 438.

In this connection, the wording of the exception in Section 1 of the Franchise Act of 1905, "except telegraph or telephone lines doing an interstate business", is significant. The article "an", according to the Supreme Court of California, in the statutes of that State, means "any" (*Kaufmann v. Superior Court*, 115 Cal. 152-155). It is obvious, we submit, that the Legislature intended to except lines doing *any* interstate business.

The case of *People v. Knight*, 192 U. S. 21, is cited by counsel for the City against the position of appellee that its telephone lines in Pomona are instruments of interstate commerce. That case, however, is clearly without relevancy to the case here. There, it was held that a cab service was not an instrument of interstate commerce, simply because the cabs carried passengers to a ferry landing from which the passengers might embark on an interstate trip. The cab service did not constitute an integral part of the interstate carriage. But here the appellee's telephone system in Pomona, consisting of its poles and wires and appliances, used in connection therewith, constitutes an integral part of its entire interstate system.

The main contention of the appellants, respecting the interstate *telephone* business of the appellant to and from Pomona, is the claim, that the affidavits, filed on behalf of the appellee, are too general. But, they made no such contention in the Circuit Court; they did not, as they should have done, had they at that time been dissatisfied in the particular now complained of, apply to that Court for an

order that the appellee be required to file affidavits with more specific information. On the contrary, they treated the affidavits as sufficient in this respect, and stipulated for a submission of the case upon them.

Answering a similar contention, the Circuit Court of Appeals, for the Seventh Circuit, in the case of *Forrest v. Pittsburgh Bridge Co.*, 116 Fed., 357, 359, said:

> "The complaint was made at argument that the affidavits in support of the motion were indefinite —that they were conclusions, rather than statements of fact. Affidavits are always subject, more or less, to this criticism. No application was made in the Circuit Court looking to greater definiteness."

Without excluding interstate telephone lines from its operation, the Act of March 22, 1905, would be unconstitutional.

Upon this point it may be added that the reason why the Act of March 22, 1905, excepted from its operation telephone lines doing an interstate business, is, of course, that without such a reservation, it would have been in conflict with the provisions of Subdivision 3, of Section 8, of Article I of the Constitution of the United States, pursuant to which the Congress of the United States alone has the power to regulate commerce among the several States. This proposition, we understand, is not disputed, because it has been repeatedly decided that interstate telephone communications are interstate commerce.

See:

Muskogee National Telephone Co. v. Hall, 118 Fed. 382;
Western Union Tel. Co. v. Pendleton, 122 U. S. 347;
In re Penn. Telephone Co., 20 Atl. 846.

See also:

City of Pasadena v. L. A. T. Ry. Co., 109 Cal. 315;
Peo. v. Craycroft, 111 Cal. 544.

THIRD.

THE APPELLEE HAS THE RIGHT UNDER SECTION 19 OF ARTICLE XI OF THE CONSTITUTION OF THE STATE OF CALIFORNIA, AS AMENDED OCTOBER 10, 1911, TO USE THE STREETS OF THE CITY OF POMONA FOR ITS TELEPHONE SYSTEM WITHOUT A SPECIAL FRANCHISE THEREFOR FROM THE CITY.

Prior to October 10, 1911, Section 19 of Article XI of the Constitution of the State of California was as follows:

> "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This section has uniformly been construed by the Supreme Court of California to be a direct grant, from the State, to the persons therein designated, of the right to lay pipes in the streets of a city, for the purposes specified; subject only to the condition that they must be laid under the direction of the Superintendent of Streets, or other officer in control thereof, and subject to such proper regulations for damages and indemnity for damages, as the city may see fit to impose. Under this section, it has been held, that

a city may not require the persons, to whom the grant is made, to obtain a permit from it, as a condition precedent to the exercise of the right granted by the constitutional provision.

See,

People v. Stephens et al., 62 Cal. 209, 235;
In re Johnston, 137 Cal. 115, 119;
Denninger v. Recorder's Court, etc., 145 Cal. 638;
Stockton Gas & Electric Co. v. San Joaquin Co., 148 Cal. 313, 318;
City & County of San Francisco v. Oakland Water Co., 148 Cal. 331, 333;
People v. Los Angeles etc. Gas Co., 150 Cal. 557.

On October 10, 1911, this section of the Constitution was amended by the people of the State, so that the same now is as follows:

> "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, *telephone* service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. *Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.* A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance."

Under the doctrine of the foregoing cases, we submit, the constitutional provision, as amended, is a direct grant

by the people to persons or corporations of the right to establish and operate works for supplying the inhabitants of a municipal corporation with telephone service, subject to the right, reserved to the municipal corporation, of imposing such conditions and regulations as under its organic law it may prescribe, and of regulating the charges for the telephone service.

Although this constitutional amendment was adopted since the rendition of the decisions of the Courts below, nevertheless, if the contention of the appellee with respect thereto is sound, the judgment of the Circuit Court of Appeals must be affirmed, irrespective of any of the other questions discussed.

Pugh v. McCormick, 14 Wall. 361.

Conclusion.

In conclusion, it is respectfully submitted, that the claim, here asserted by the appellee, to use the streets of the City of Pomona for its telephone system, under a grant of right in that behalf from the State of California, and without a special franchise from the City, is not novel, or unusual. In California, as in many other States, the Legislature intended by Section 536 of the Civil Code, as re-enacted in 1905, that the subject of granting franchises to telephone and telegraph companies should not be confided to municipalities. The State reserved that subject to itself and has dealt with it by proper legislation. This it has done, because the subject from its very nature has a wider scope than the confines of a municipality. Owing, however, to the peculiar provision of the Constitution of the State that cities, organized under special charters, are not subject to or controlled by general laws of the State in "municipal affairs," the Supreme Court of California has held that this intention does not control in cities organized under special, or freeholders', charters, having provisions inconsistent with Sec-

tion 536. As to all other cities in the State no reason, we contend, has been suggested, why this legislative intent should not be given full force and effect.

The record in the case at bar shows, and it is not denied by the appellants, that the appellee has asserted the rights here claimed, only subject to its ever ready compliance with, and observance of, all proper police regulations of the City, over the appellee's system, including the right to designate the places where poles should be set, the height of the wires, the placing of them underground and all kindred matters.

The record also shows, and it is not disputed, that the appellee has a large and extensive telephone system in the States of California, Oregon, Washington and Nevada, which is operated as a connected and homogeneous whole. Hundreds of telephone exchanges have been established and thousands of miles of poles and wires have been erected and strung. Conversations by telephone, over the lines of the appellee, are held between persons in business centers and in the remotest villages of the State, as well as with persons in other States. We submit, the policy of the law is not to put the life, or existence, of these vast enterprises into the hands of local boards of trustees or councilmen, but, by a State grant of the right to use the streets and highways of the State, to encourage and insure their construction and continued maintenance and operation.

Upon this subject the Court of Civil Appeals of Texas in the case of *City of Texarkana v. Southwestern Tel. & Tel. Co.*, 106 S. W. 915, at page 917, clearly and forcibly expressed its view as follows:

> "When we consider the nature of the business of telegraph and telephone lines in this busy commercial age, we have a most cogent reason for the Legislature declining to commit to the arbitrary control of the municipalities throughout the state the use by such companies of the public streets and alleys. These companies are not primarily of local concern,

affecting only the inhabitants of the towns and cities through which they pass, but they essentially concern the public at large, in that they furnish quick and cheap means of communication between all points throughout the country, by which a very large percentage of the business of the country is transacted. In other words, the business is such a one as calls for the exercise of State regulation, rather than the delegated power of municipal control. To interpret Article 419 as appellant asks is to hold that Article 698 has been repealed by implication, and that cities and towns incorporated under the general statutes of Texas, which as matter of fact would include nearly all of the cities and towns within the State, would have the power to exclude entirely telegraph and telephone companies from occupying the streets and alleys of such cities and towns. A thing so fraught with evil consequences to the public convenience at large was certainly never contemplated by the Legislature."

Aside from the general State law upon the subject, we submit, that the people of the State of California, at the last election held on October 10th, 1911, so amended the fundamental law of the State, as to leave no further room for doubt that telephone companies have the right here claimed by the appellee.

It is respectfully submitted, that if this Court shall hold that it has jurisdiction of this appeal, then, for the reasons herein stated, the decree of the Circuit Court of Appeals should be affirmed.

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Of Counsel.

8

Office Supreme Court, U. S.
FILED.
MAR 14 1912
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 215.

THE CITY OF POMONA (A MUNICIPAL CORPORATION) ET AL., APPELLANTS,

vs.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION), APPELLEE.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY OF APPELLEE TO SUPPLEMENTAL BRIEF OF APPELLANTS.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Appellee.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

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Third:

ANY REPEAL OF SECTION 536, AS RE-ENACTED IN 1905, BY SUBDIVISION 19 OF ARTICLE XI OF THE CONSTITUTION, AS AMENDED OCTOBER 10, 1911, WOULD NECESSARILY BE WITHOUT PREJUDICE TO THE RIGHTS OF THE APPELLEE UNDER SECTION 536. THOSE RIGHTS CONSTITUTE A CONTRACT BETWEEN THE APPELLEE AND THE STATE, WHICH IS NOT SUBJECT TO IMPAIRMENT BY THE STATE, EITHER THROUGH ITS LEGISLATURE, OR BY THE PEOPLE IN THEIR CONSTITUTION.

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Fourth:

SUBDIVISIONS 4 AND 13, SECTION 764, OF THE MUNICIPAL CORPORATION ACT, IF INCONSISTENT WITH SECTION 536 OF CIVIL CODE, AS RE-ENACTED IN 1905, WERE REPEALED BY IT.

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Fifth:

SUBDIVISIONS 4 & 13, OF SECTION 764 OF THE MUNICIPAL CORPORATION ACT DID NOT, NOR DOES SUBDIVISION 58 OF SECTION 54 OF ITS CHARTER, CONFER UPON THE CITY OF POMONA THE POWER TO GRANT OR REFUSE A FRANCHISE TO TELEGRAPH OR TELEPHONE COMPANIES.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 215.

THE CITY OF POMONA (A MUNICIPAL CORPORATION) ET AL., APPELLANTS,

vs.

THE SUNSET TELEPHONE AND TELEGRAPH COMPANY (A CORPORATION), APPELLEE.

BRIEF OF APPELLEE IN REPLY TO SUPPLEMENTAL BRIEF OF APPELLANTS.

There was delivered to us, yesterday afternoon, by appellants, a brief, styled "Supplemental Brief on behalf of the appellants on the effect of the amendments to Section 19 of Article XI of the Constitution, adopted on October 10, 1911." In this brief appellants have raised some new points, to which we have prepared this short reply.

First.

SECTION 536 OF THE CIVIL CODE, AS RE-ENACTED IN 1905, WAS NOT REPEALED BY SECTION 19 OF ARTICLE XI OF THE CONSTITUTION, AS AMENDED OCTOBER 10, 1911.

Appellants urge that Section 19 of Article XI of the Constitution of California, as amended October 10, 1911, repealed *in toto* Section 536 of the Civil Code, as re-enacted in 1905. No reason, however, is given for this conclusion. We submit it is not sound. There is no inconsistency whatever between section 536 and the constitutional provision in question. The one is a grant by the State, through its legislature, of certain rights, and the other is a direct grant by the people of the State, through their constitution, of the same and other rights, to be exercised only subject to certain conditions and regulations, to be imposed by municipalities under their organic law.

As we understand their argument, appellants contend that, because the constitutional provision, as amended, provides that persons, or corporations, may establish and operate works for supplying telephone service "upon such conditions and under such regulations as the municipality may prescribe under its organic law," the municipality has the absolute right to grant or refuse a franchise to persons or corporations desiring to establish and operate a telephone system in it. No such conclusion can, we submit, be drawn from the language used. On the contrary, the reservation, to the municipalities of the State, of the power to fix the conditions upon, and regulations under which, the uses mentioned may be exercised, is an implied recognition of the existence of the right to exercise them.

The appellants do not deny that section 19 of Article XI, prior to its amendment, extended the right to any one, desiring to avail himself thereof, to exercise any of the privileges therein mentioned. In the case of *Clark vs. The City*

of Los Angeles, 116 Pac., 722 (cited by appellants), at page 726, the Supreme Court of the State said:

> "The express grant made by section 19 is of the privilege, franchise, or easement to place in the public streets of a city the conduits necessary or convenient for the business of supplying light or power to the city and its inhabitants. It may be accepted by any person or by any company duly incorporated to engage in that business."

The express grant made by the section, as amended, differs from the original only in that the same must, if exercised, be subject to such conditions and regulations as the municipality may, under its organic law, prescribe.

Appellants comment upon the radical change which, they say, has taken place within the last decade "in respect to the control of the secondary uses of city streets." They say that "this is best evidenced by recent changes in the organic laws of the various States of the Union." Whatever may have been the changes in this respect, however, in other States of the Union, it is manifest, we submit, that no such change has taken place in California. On the contrary, the privileges, extended by the fundamental law of the State to persons or corporations, desiring to avail themselves of them, are more numerous under Section 19 of Article XI of the Constitution as amended.

Second.

THE CHARTER OF POMONA CONTAINS NO PROVISION, INCONSISTENT WITH SECTION 536 OF THE CIVIL CODE, AS RE-ENACTED IN 1905, OR WITH SECTION 19 OF ARTICLE XI, AS AMENDED, AND BOTH ARE, THEREFORE, IN FULL FORCE AND EFFECT IN POMONA.

Appellants call attention to the fact that the city of Pomona adopted a freeholders' charter in 1911 (Statutes of California, 1911, pages 1913 to 1957).

Of course, the fact that Pomona adopted a freeholders' charter in 1911, even if that charter contains provisions inconsistent with section 536, as re-enacted in 1905, could not affect the rights of appellee thereunder. But, aside from this consideration, the charter of Pomona contains no provision which conflicts or is inconsistent with section 536, as re-enacted, or with section 19 of article XI of the Constitution, as amended.

Appellants say, on page 6 of their Supplemental Brief, that, in the *Pasadena* case, it was held that the charter of the city of Pasadena vested it with full control of its streets, and that, therefore, in no event was that city subject to section 536 of the Civil Code, as re-enacted in 1905. They further say, on the same page,

> "The city of Pomona adopted such a charter in 1911. Full control over its streets is there reserved to and vested in the city of Pomona, and this charter, as the organic law of the city, is entitled now to the same consideration as the charters of other cities in the State such as Pasadena."

Appellants are, however, in error in saying that "full control over its streets is reserved to and vested in the city of Pomona" by its charter, if they thereby mean that the city is given the power to grant or refuse franchises to telegraph

or telephone companies. They point to no provision of the charter, which supports this statement. We have been unable to find any. The only provision of the charter, material here, is contained in subdivision 58 of section 54 (Stats. of Cal., 1911, pp. 1913-1957). Section 54 prescribes the power of the common council, as follows:

> "As the legislative organ of the city, the council, subject to the provisions and restrictions of this charter shall have power":

(Subdivision 58:)

> "To cause the removal and placing underground of all telephone, telegraph, electric light, and other wires within the city, or within any designated portion thereof, and to regulate or prohibit the placing of poles and suspending of wires along or across any of the streets, alleys, highways, and public places in the city."

This power, as will hereafter be pointed out, in connection with subdivisions 4 and 13 of section 764 of the Municipal Corporation Act, and which are discussed by appellants on pages 25 and 26 of their Supplemental Brief, is obviously the recognition of the police power of the city, in the premises. There is no delegation by the State to the city of Pomona, through its charter or otherwise, of the right to grant franchises to telegraph or telephone companies. On the contrary, the language of subdivision 58 of section 54 of the charter of Pomona is, by implication, a clear recognition of the right of such companies to have their systems in the city, subject to the power of the city to cause the removal and placing underground of the wires and the regulation and prohibition, if necessary, of the placing of poles and the suspension of wires along or across the streets and highways of the city; in other words, there is reserved to the city the right to order the poles removed from the streets and that the wires be placed underground.

Appellants say (Sup. Brief, p. 9):

> "But no matter what the conditions may be, so long as they conform to the organic law they find full warrant and specific authority in the Constitution."

Whatever may be the case with other cities, such as Pasadena, for instance, regarding the conditions which they, under their "organic law," may impose upon telegraph, or telephone companies, so far as Pomona is concerned, under its organic law, the conditions, as we have pointed out above, which it can impose upon such companies, are clearly defined and limited.

Appellants refer to the case of *State ex rel. Tel. & Tel. Co. v. Spokane,* 24 Wash., 53 (Sup. Brief, pp. 10-11). We submit, that case is obviously not in point. In the State of Washington the constitutional provision, granting telegraph or telephone corporations the right to construct and maintain telegraph and telephone lines within the State *is not self-operative.* The Supreme Court of Washington in the case last mentioned expressly so declares. By that constitutional provision, the legislature is required, by general law of uniform operation, to provide reasonable regulations to give effect to the section. In complying with this mandate of the constitution, the Legislature (Ballinger's Code of Washington, sec. 4369) provided that "where the right of way * * * is within the corporate limit of any incorporated city, *the consent of the city council thereof shall first be obtained before such telegraph and telephone lines can be erected thereon.*" Manifestly, this is a provision radically different from any that obtains in California with respect to such companies. In California section 19 of article XI of the Constitution has always been held to be self-operative. See the cases cited on page 54 of Appellee's Brief.

The difference between the *status* of such companies, with respect to their right to occupy the streets of municipalities

in Washington and in California is not, as claimed by appellants (Sup. Brief., p. 11), that in Washington the legislature may make reasonable regulations, while in California the municipalities have the power to determine the conditions upon which their streets shall be used, but the difference is, that in Washington telegraph or telephone lines *cannot be erected* in the streets of a municipality *without its consent*, while in California there is no such general limitation.

We have examined the case of *Blair v. Chicago*, 201 U. S., 400, cited and discussed by appellants on pages 12-15 of their Supplemental Brief, with as much care as the short time at our disposal has permitted. It seems to us that the vital difference, between that case and the case at bar, is that, there the city had power to give or refuse consent to the occupation and use of its streets for street railway purposes (202 U. S.. 457, 458, 460), while here no such power is vested in the City of Pomona.

Third.

ANY REPEAL OF SECTION 536, AS RE-ENACTED IN 1905, BY SUBDIVISION 19 OF ARTICLE XI OF THE CONSTITUTION, AS AMENDED OCTOBER 10, 1911, WOULD NECESSARILY BE WITHOUT PREJUDICE TO THE RIGHTS OF THE APPELLEE UNDER SECTION 536. THOSE RIGHTS CONSTITUTE A CONTRACT BETWEEN THE APPELLEE AND THE STATE, WHICH IS NOT SUBJECT TO IMPAIRMENT BY THE STATE, EITHER THROUGH ITS LEGISLATURE, OR BY THE PEOPLE IN THEIR CONSTITUTION.

In the case of the *Western Union Telegraph Co. vs. Hopkins,* 116 Pac., 57, the Supreme Court of California, in discussing the rights acquired by the telegraph company, under section 536, said (p. 563):

> "While there is some conflict in the authorities cited from other states, we are of the opinion that the weight of authority and the better reasoning support the construction given by the Visalia case, viz: that the section was a grant by the state to all telegraph corporations accepting the same, of the rights therein specified. The reasons given by learned counsel in support of a contrary construction do not appeal to us as having much force in the face of the clear and unambiguous language used. And to the extent that the offer of the state contained in the section was accepted by a telegraph company by actual occupation of a highway prior to any repeal, modification or suspension of the section, no right of revocation having been reserved, such telegraph company has vested rights and cannot be taken away by state or city without compensation."

This proposition is so well established and so familiar to the court that it requires no further citation of authorities.

Assuming that there has been a repeal of section 536, appellants urge that any contractual rights or obligations of the appellee under that section are subject to repeal by

the State, by reason of certain provisions of the constitution of California. In this connection they rely upon section 1 of article XII and section 21 of article I, quoted on page 18 of their Supplemental Brief.

So far as section 21 of article I is concerned, it seems sufficient to say, that it concerns special privileges and immunities, to neither of which it can be claimed that section 536 belongs. The four cases from this court, cited on page 20 of the Supplemental Brief, and discussed on pages 21-24, all deal with special franchises, or exclusive privileges. Neither these cases, nor this constitutional provision is, we submit, in any way applicable.

So far as section 1 of article XII is concerned, the Supreme Court of California, in the case of the *Western Union Telegraph Company vs. Hopkins,* expressly refused to entertain the identical contention that is here advanced by the appellants through the same counsel.

The court said (116 Pac., 557, 563):

> "In this connection, learned counsel claim that a right to revocation was reserved, basing their claim on the constitutional provision that all laws passed pursuant to the section providing for the formation of corporations may be altered from time to time or repealed (sec. 31, art. IV, Const. of 1849; sec. 1, art. XII, Const. of 1879), and on section 327, Political Code, providing that a statute may be repealed at any time except when otherwise provided therein, and that persons acting thereunder are deemed to have acted in contemplation of this power of repeal. The effect of similar provisions was learnedly discussed by Justice Cooley in *The City of Detroit v. Detroit, etc., Co.,* 43 Mich. 140, where it was sought, under express authority of an act of the legislature of the state, to deprive a plank road company of its right acquired under a prior statute to maintain a toll-gate within the existing corporate limits of the city of Detroit. It was there concluded that the effect would be to deprive the company of property lawfully acquired, and that there was no well considered

> case in which it had been held that a legislature, under the general power to amend a charter, might take from a corporation any of its substantial property or property rights. A distinction is made in the opinion between the cases involving the question of the liability of corporations to the control of the general police laws and cases involving acts passed solely in the exercise of the reserved general power to amend and repeal charters of corporations. Of course, the liability of plaintiff to all such reasonable regulations as is warranted in the proper exercise of the police power cannot be disputed. In fact this is expressly stipulated by the provisions in section 536, Civil Code, that the system of the telegraph company must be constructed 'in such manner and at such points as not to incommode the public use of the road or highway.' But in so far as actual occupation of a highway by a telegraph company was taken or had under section 536, Civil Code, we are of the opinion that a vested right resulted, subject only to the proper exercise of the police power, and that it must be held that there was no such reservation as warranted such right being taken away without compensation."

We submit that, not only has there been no repeal of section 536, but, even if there had been, the rights of the appellee acquired by it under that section are secured to it against impairment by the State.

Fourth.

SUBDIVISIONS 4 AND 13, SECTION 764, OF THE MUNICIPAL CORPORATION ACT, IF INCONSISTENT WITH SECTION 536 OF CIVIL CODE, AS RE-ENACTED IN 1905, WERE REPEALED BY IT.

On pages 25 and 26 of their supplemental brief, appellants discuss subdivisions 4 and 13 of section 764 of the Municipal Corporation Act, and seem to contend that they conferred upon the city of Pomona the right to grant franchises. Assuming, for the purposes of this point, that this contention is sound, we submit it is unavailing to the appellants, because these two subdivisions, if given this construction, were necessarily repealed by section 536 of the Civil Code, as re-enacted in 1905. The Municipal Corporation Act is a general law of the State of California, and is subject, of course, to repeal by subsequent, or conflicting, general laws of the State, such as section 536, would in this aspect of the question be.

Fifth.

SUBDIVISIONS 4 & 13, OF SECTION 764 OF THE MUNICIPAL CORPORATION ACT DID NOT, NOR DOES SUBDIVISION 58 OF SECTION 54 OF ITS CHARTER, CONFER UPON THE CITY OF POMONA THE POWER TO GRANT OR REFUSE A FRANCHISE TO TELEGRAPH OR TELEPHONE COMPANIES.

Obviously, and as has been repeatedly decided, with reference to enactments in this and other statutes, similar to subdivisions 4 and 13 of Section 764 of the Municipal Corporation Act and to subdivision 58 of Section 54 of the charter of Pomona, these confer upon that city the right to determine and designate the public streets or parts of public streets in which telegraph or telephone lines may be constructed and maintained, and to order the poles and wires off the streets and the placing of the wires underground. They do not confer upon the cities the power to determine whether or not a telegraph or telephone company may occupy their streets. They are a recognition of the right of such municipalities to exercise proper and reasonable police supervision and regulation in streets and highways over the *quasi* public uses to which they refer. Such provisions are not a grant of power. The highways of the state, including the streets in its cities, are under the control of the people of the state. In the state of California the people, through their legislature and by their constitution, have declared that telegraph and telephone corporations may construct their lines upon the streets and highways of the state, subject to such conditions and under such regulations, as the municipalities under their organic law may prescribe. It is not within the power of Pomona under its organic law to grant or withhold the right or privilege, which is the subject of the dispute between it and the appellee.

This particular question is very fully discussed in the case of *City of Wichita vs. Missouri and Kansas Teleph. Co.*, 78

Pac. 886. In that case the Supreme Court of Kansas said upon this subject (78 Pac. pp. 888, 889):

> "It is also the claim of plaintiff, that so much of the general telegraph act as is embodied in section 74 of chapter 23, Gen. St. 1868, extending to telegraph companies the right to occupy and use the streets for its poles and wires, has been repealed by implication. It is pointed out that subsection 22 of section 11 of the city charter act (chapter 37, p. 84, Laws 1881) specifically gave to cities of the first class the power 'to grant the right of way for the erection of telegraph or telephone posts and wires along and upon any of the streets and alleys' of the city. It is claimed by plaintiff this section operated as a repeal by implication, and in effect eliminated the word 'streets' from said section 74 of chapter 23, Gen. St. 1868. Said subsection 22 reads: 'Twenty-second. To grant the right of way for the erection of telegraph or telephone posts and wires along and upon any of the streets, alleys or ways of the city, and change, modify and regulate the same.' With the claim of plaintiff that subsection 22 of section 11 of the city charter act (chapter 371, p. 79, Laws 1881) by implication repealed so much of section 74 of chapter 23, Gen. St. 1868, as extended to telegraph companies the right to the occupancy of the streets and alleys with their poles and wires, we cannot agree. Nowhere in the charter act is there reference made to the general laws relating to telegraph companies, nor is there an expression which may be fairly said even by implication to repeal the general telegraph laws. Unquestionably the legislature by said subsection 22, in the use of the phrase 'to grant the right of way', contemplated the granting of something. What it was the intention to grant is explained in the remaining words of the phrase. The words 'the right of way' define the contemplated grant. We conclude that, as applied to telegraph companies and telephone companies, the right of way to which the grant applies is the right of the city to determine and designate the streets and alleys which may be occupied and used by the posts and wires of the companies."

This subject was also fully gone into, and the same doctrine announced, as is contained in the foregoing case, by the Supreme Court of Montana in the case of *State ex rel. Rocky Mountain Bell Teleph. Co. v. Mayor, etc.*, 76 Pac. 758, at pages 760 and 761.

To the same effect also are:

In re Johnston, 137 Cal. 115, 120, 122;
Abbott v. City of Duluth, 104 Fed. 833;
City of Wichita v. Old Colony Trust Co., 132 Fed. 641, 645, 648;
Chamberlain et al. v. Iowa Teleph. Co., 93 N. W. 596, 599;
State ex rel. v. Sheboygan, 86 N. W. 657;
Michigan Teleph. Co. v. City of Benton Harbor, 80 N. W. 386;
Village of Carthage v. Central N. Y. Tel. & Tel. Co., 78 N. E. 165;
City of Texarkana v. Southwestern Tel. & Tel. Co., 106 S. W. 915; followed in
Bishop v. Riddle, 113 S. W. 151-153.

In each of those cases provisions, similar to subdivisions 4 and 13 of Section 764 of the Municipal Corporation Act, and to subdivision 58 of Section 54 of the Charter of Pomona, were under consideration, with reference to the right of telephone companies to use the streets of the particular City, under some general law of the State. In all of them such provisions were held to be a recognition of the police power of the municipality over the right of such companies to the use of the City's streets, and not a delegation of power to the municipality to grant or to deny the right.

Conclusion.

The claim of the appellee that section 19 of article XI of the Constitution of California, as amended in 1911, extends to any person, desiring to avail himself thereof, the right to exercise in the municipalities of the State the privileges therein mentioned, is, we submit, not groundless, but, on the contrary, a contention which has the unanimous support of every case in California that has dealt with this subject. Appellants do not contend that the appellee has ever in any way embarrassed the enforcement of public rights by the city of Pomona, or by any municipality; on the contrary, the appellee claims the rights and privileges, extended to it by the Constitution and laws of the State, only subject to a prompt and willing readiness to obey and comply with every condition and regulation which the municipalities of the State, under their organic law, may prescribe.

March 14, 1912.

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CITY OF POMONA *v.* SUNSET TELEPHONE AND TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 215. Argued March 14, 15, 1912.—Decided April 8, 1912.

A provision in a state constitution that municipal corporations may establish and operate public utility plants, and that persons and corporations may establish and operate works for supplying public service upon such conditions and under such regulations as the municipality may prescribe, is a step towards municipal control or ownership, and is not a grant to others of a right to occupy streets without the consent of the municipality; nor does it limit the municipality to regulations under its police power. The conditions are of general import; and so *held* as to the provision in Article XI, § 19, of the constitution of California as amended October 11, 1911.

There is no sufficient reason why this court should not follow the highest court of California in construing "telegraph" corporations as used in § 536 of the Civil Code of that State as not including "telephone" corporations.

Where a statute is amended so as to bring a certain class thereunder, the amendment to take effect at a subsequent date, before which date another act is passed relating to the same subject with a general repealing act enumerating exceptions, the amended statute is repealed, subject only to the exceptions before any rights accrue under the amendment.

In the absence of any apparent policy inducing it, it will be assumed that an exception to the repealing clause of an act to regulate franchises of "lines doing an interstate business" was made unwillingly and because the legislature assumed it was bound to exempt such lines from regulations.

In this case *held* that under the statutes of California a telephone corporation operating interstate and local lines in Pomona, a city of the fifth class, obtained rights to maintain its main line in the streets but not its local posts and wires except subject to regulations of the city.

172 Fed. Rep. 829; 97 C. C. A. 251, reversed.

THE facts, which involve the validity and constitutionality of certain provisions of the constitution and statutes of California in regard to the use of streets by telephone companies, are stated in the opinion.

Mr. John W. Shenk and *Mr. William J. Carr*, with whom *Mr. C. W. Guerin*, *Mr. Robert G. Loucks*, *Mr. W. B. Mathews*, *Mr. Leslie R. Hewitt*, *Mr. J. P. Wood* and *Mr. J. W. Joos* were on the brief, for appellants:

Poles and wires in the streets without permission given by competent authority are nuisances and may be abated. No user and no lapse of time can legalize the nuisance. The company can justify its invasion of the streets only by pointing to a particular statute or law authorizing it. The burden is on it to justify its use of the streets. *L. T. Co.* v. *S. & W. W. R. Co.*, 41 California, 562; *Siskiyou Lumber Co.* v. *Rostel*, 121 California, 511; *Marini* v. *Graham*, 67 California, 130; *Taylor* v. *Reynolds*, 92 California, 573; *Vandehurt* v. *Thoicke*, 113 California 147; *So. Pac. Co.* v. *Pomona*, 144 California, 339; *Coverdale* v. *Edwards*, 155 Indiana, 374, 383; *Valparaiso* v. *Bozarth*, 153 Indiana,

536; *Baumgartner* v. *Hasty*, 100 Indiana, 57; *Indianapolis* v. *Miller*, 27 Indiana, 394; *Telegraph Co.* v. *Hess*, 125 N. Y. 641; *D., L. & W. R. R. Co.* v. *Buffalo*, 158 N. Y. 266, 478; *Daublin* v. *Mayor of New Orleans*, 1 Martin (La.), 185.

No user or lapse of time can legalize such a nuisance. *People* v. *Gold Run Min. Co.*, 66 California, 138, *Ex parte Tayor*, 87 California, 91; *Bowen* v. *Wendt*, 103 California, 236; *Cloverdale* v. *Smith*, 128 California, 230; *Webb* v. *Demopolis*, 95 Alabama, 116.

It devolves upon the company to justify the use of the streets by its poles and lines. *Sunset Tel. & Tel. Co.* v. *Pasadena*, 42 Cal. Dec. 593; *D., L. & W. R. R. Co.* v. *Buffalo*, 158 N. Y. 266, 478.

No claim of right under the act of Congress of July 24, 1866 (Federal Telegraph Act) is here presented.

The interstate commerce clause of the Constitution does not in itself confer upon the company the right to appropriate for the maintenance of its system portions of the streets of the city of Pomona. Competent authority from the State therefore is necessary. *N. W. Telephone Exch. Co.* v. *St. Charles*, 154 Fed. Rep. 386.

The expenditure of money by the company and the extension of its system, even though with the consent or at the request of the city, furnishes no authority to the company to maintain its lines. The mode whereby the city may contract or grant a privilege being prescribed, that mode constitutes the measure of the city's power in such respect, and any right granted or claimed otherwise is a mere nullity. Estoppel will not lie against the city in such case to deny the existence of the contract or privilege. *Dean* v. *Contra Costa County*, 122 California, 421, 422; *Pac. Electric Ry. Co.* v. *Los Angeles*, 194 U. S. 112; *Pelham* v. *Telephone Co.*, 62 S. E. Rep. (Ga.) 186; *Tri-State Tel. Co.* v. *Thief River Falls*, 183 Fed. Rep. 854; *Zottman* v. *San Francisco*, 20 California, 96; *Times Pub. Co.* v. *Weatherby*, 139 California, 618; *Frick* v. *Los Angeles*,

115 California, 512; *Wichmann* v. *Placerville*, 147 California, 162, 164, 165; *Pavement Co.* v. *Broderick*, 113 California, 628; *McCoy* v. *Briant*, 53 California, 247; *French* v. *Teschemaker*, 24 California, 518, 550; *Brady* v. *New York*, 16 How. Pr. 432, 444; *Arnott* v. *Spokane*, 6 Washington, 442; *Chippewa Bridge Co.* v. *Duland*, 99 N. W. Rep. 603; *Murphy* v. *Louisville*, 9 Bush. 189; *Jersey City Oil Co.* v. *Mayor*, 60 Atl. Rep. 381; *Providence* v. *Electric Lighting Co.*, 91 S. W. Rep. 664.

Section 536 of the Civil Code, prior to its repeal and reenactment in 1905, in terms applied only to telegraph corporations and to lines of telegraph. It did not apply to telephone corporations nor purport to confer any rights in the highways as to telephone wires or lines. The company derived no rights thereunder to construct or maintain telephone poles, lines or wires in the streets of the City of Pomona.

The lines and wires of the company in Pomona, which were destroyed or threatened by the city, were not telegraph lines or wires, but were telephone lines and wires. *Richmond* v. *Telephone Co.*, 174 U. S. 761; *Toledo* v. *West. Un. Tel. Co.*, 107 Fed. Rep. 10; *Cumberland Tel. Co.* v. *Evansville*, 127 Fed. Rep. 187.

No rights were acquired by the company under § 536 of the Civil Code prior to its repeal and reënactment in 1905. The word "telegraph" as therein used does not include "telephone." *Davis* v. *Pacific Tel. Co.*, 127 California, 312; *Sunset Tel. Co.* v. *Pasadena*, 42 Cal. Dec. 593.

The construction placed upon the word "telegraph" as contained in § 591 of the Penal Code in no wise controls the court in construing the same word as used in § 536 of the Civil Code. Because a word or expression as used in one statute is given a certain meaning, it does not follow that the same meaning must be given to it when used in another statute. The same word or expression may have different meanings even when used in the

same statute. Endlich on Statutes, § 387; *Rupp* v. *Swineford*, 40 Wisconsin, 28, 31; *L. & N. R. Co.* v. *Gaines*, 3 Fed. Rep. 266; *Wood* v. *Brady*, 150 U. S. 18; *Henry* v. *Trustees*, 48 Oh. St. 671, 676; *State* v. *Knowles*, 90 Maryland, 646, 654; *Wall* v. *Board of Directors*, 145 California, 468, 473.

The rules of construction properly applicable to the particular statute or expression controls the courts in their interpretations thereof. A previous construction of the same statute or the same expression, arrived at under a different rule of construction, is not binding and will be disregarded. *Blythe* v. *Ayers*, 96 California, 532, 590; *Dixon* v. *Pluns*, 98 California, 384, 388; *San Francisco* v. *Sharp*, 125 California, 536; *Hostetter* v. *Los Angeles St. Ry. Co.*, 108 California, 38, 44; *Bartram* v. *Central Turnpike Co.*, 25 California, 284.

If a statute relating to the exercise of a franchise or a contract therefor is susceptible of two meanings, the one restricting and the other extending the powers of the grantee, that construction is to be adopted which works the least harm to the State. *Water Co.* v. *Knoxville*, 200 U. S. 22; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *Covington Turnpike* v. *Sanford*, 164 U. S. 578, 588; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *Vernon Shell Road &c. Co.* v. *Savannah*, 22 S. E. Rep. 625; *Water Co.* v. *Freeport*, 180 U. S. 587; *Water Co.* v. *Danville*, 180 U. S. 619; *Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624.

In the construction of statutes, the intent of the legislature is to be given effect. This intent is to be found in the statute itself. Words are to be interpreted according to their meaning at the time of the passage of the statute. *Tynan* v. *Walker*, 35 California, 634, 642; *Massey* v. *Dunlap*, 146 Indiana, 350, 358; *Sharpe* v. *Wakefield*, 22 Q. B. D. 239, 242; *Board of Works* v. *United Tel. Co.*, 13 Q. B. D. 904, 914; *Aerated Bread Co.* v. *Gregg*,

L. R., 8 Q. B. 355; *Brown* v. *Visalia*, 141 California, 372, 375.

Statutes purporting to grant rights in the public highways to telegraph companies had no application to telephone companies. *Richmond* v. *Bell Tel. Co.*, 174 U. S. 761; *Cumberland Tel. Co.* v. *Evansville*, 127 Fed. Rep. 187; *Toledo* v. *West. Union Tel. Co.*, 107 Fed. Rep. 10; *Sunset Tel. Co.* v. *Pomona*, 164 Fed. Rep. 561, 573; *S. C.*, 172 Fed. Rep. 838; *Home Telephone Co.* v. *Nashville*, 101 S. W. Rep. 770. See also *Suburban Light Co.* v. *Boston*, 153 Massachusetts, 200.

Section 536 of the Civil Code, as reënacted in 1905, was repealed, except as to "telegraph or telephone lines doing an interstate business" by the Franchise Act of 1905, commonly known as the Broughton Act (Statutes 1905, page 777). The company cannot justify its use of the streets under said section as reënacted.

So far as the Broughton Act was repugnant to and in conflict with the provisions of § 536 of the Civil Code, as reënacted, it operated as repeal thereof. See *Ex parte Sohncke*, 148 California, 262.

For the history of legislation in California purporting to extend authority direct from the State to use the public highways for the construction and maintenance of telephone lines, see Ord. Mains. No. 30, Pomona; No. 75 of Pasadena; No. 1130 of Los Angeles; *Sunset Tel. Co.* v. *Pasadena*, 42 California, 593; *Horton* v. *Los Angeles*, 119 California, 602; *Home Tel. Co.* v. *Los Angeles*, 211 U. S. 265; *Telegraph Co.* v. *Spokane*, 24 Washington, 53; *Dean* v. *Contra Costa County*, 122 California, 421; *Los Angeles* v. *Davidson*, 150 California, 59; *McGinnis* v. *Mayor*, 153 California, 711.

The lines of the company in Pomona which were destroyed or threatened by the city were not lines doing an interstate business within the meaning of the exception in the Broughton Act. Exceptions must be strictly con-

strued. Lewis' Suth. Stat. Const., 2d ed., § 352; *People* v. *Morrill*, 26 California, 336; *Southern Bell Tel. Co.* v. *D'Alemberte*, 21 So. Rep. 571.

Although there may be a technical distinction between a proviso and an exception, such distinction is generally disregarded. *United States* v. *Coke*, 17 Wall. 168.

The burden was on the company to show that its lines were doing an interstate business. *Penn. Ry. Co.* v. *Knight*, 192 U. S. 21.

The exception of "telegraph or telephone lines doing an interstate business" contained in the Broughton Act is not in itself a grant of a franchise to construct and maintain such lines. It is not the function of an exception or proviso to confer power or grant a privilege. *Chicago* v. *Phœnix Ins. Co.*, 126 Illinois, 276; *Commonwealth* v. *Hough*, 22 Pa. Co. Ct. 440; *Sunset Tel. Co.* v. *Pasadena*, *supra*.

Section 19, Art. XI, of the constitution, as amended on October 10, 1911, is not to be construed as a blanket grant of a franchise from the State to use the streets of municipalities for the operation of telephone lines and the works of the other utilities mentioned. On the contrary, said section as amended repealed *in toto* § 536 of the Civil Code, as reënacted in 1905.

This court may here properly consider § 19 of Art. XI. A decree granting an injunction based upon a law repealed after the entry of such decree, but prior to the determination of the appeal therefrom, will not be affirmed. Cooley's Const. Lim., 6th ed., 469; 3 Cyc. 407; *United States* v. *Schooner Peggy*, 1 Cr. 103, 110; *Yeaton* v. *United States*, 5 Cr. 281; *Mills* v. *Green*, 159 U. S. 651, 656, 657; *New Orleans* v. *Glover*, 160 U. S. 170; *Dinsmore* v. *So. Express Co.*, 183 U. S. 115, 120; *Linn Co.* v. *Hewitt*, 55 Iowa, 505; *Vance* v. *Ruskin*, 194 Illinois, 625, 627, 628; *Wade* v. *St. Mary's School*, 43 Maryland, 178; *Muskogee Tel. Co.* v. *Hall*, 64 S. W. Rep. 600, 604.

The repeal of § 536 of the Civil Code as reënacted in 1905 by the amendment of § 19 of Art. XI of the constitution neither impairs the obligation of any contract of the company arising under said § 536, nor assails any of its vested rights.

Under § 327, Political Code, any statute may be repealed at any time except when it is otherwise provided therein.

No vested contractual rights can arise in the face of such provisions. *Shields* v. *Ohio*, 95 U. S. 319; *Gas Light Co.* v. *Hamilton*, 146 U. S. 258; *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212; and see also *St. Louis* v. *West. Un. Tel. Co.*, 149 U. S. 465; *Postal Tel. Co.* v. *Baltimore*, 79 Maryland, 502, 510; *S. C.*, 156 U. S. 210; *Memphis* v. *Postal Tel. Co.*, 145 Fed. Rep. 602; *Blair* v. *Chicago*, 201 U. S. 200.

Again the lines destroyed or threatened by the City of Pomona were constructed or maintained wrongfully and without competent authority. Even though § 536 as reënacted in 1905 continued in full force until repealed in October, 1911, the continued maintenance of these lines wrongfully constructed or maintained in the first instance would give rise to no contractual right authorizing their maintenance for all time to come. The elements going to make up a contract are entirely wanting.

Mr. Alfred Sutro, with whom *Mr. E. S. Pillsbury* was on the brief, for appellee:

Appellee has the right, under § 536 of the Civil Code of California, as reënacted in 1905, to use the streets of the City of Pomona for its telephone system without a special franchise therefor from the city. *Davis* v. *Pacific Tel. Co.*, 127 California, 312, held that "telegraph" embraced within its meaning the narrower word "telephone," but *Sunset Telephone Co.* v. *Pasadena*, 118 Pac. Rep. 796, held otherwise.

Section 536 of the Civil Code is a grant of right by the State to telephone and telegraph corporations to use the highways of the State for their lines. *West. Un. Tel. Co.* v. *Hopkins*, 116 Pac. Rep. 557; *West. Un. Tel. Co.* v. *Los Angeles Co.*, 116 Pac. Rep. 564; *Postal Tel. Co.* v. *Los Angeles Co.*, 116 Pac. Rep. 566.

The word "highways" in § 536 includes the streets of cities and towns in California, Political Code, § 2618; *West. Un. Tel. Co.* v. *Visalia*, 149 California, 744, 746; *Niles* v. *Los Angeles*, 125 California, 572; *Smith* v. *San Luis Obispo*, 95 California, 463, 469.

The object of such legislation as is contained in § 536 is to foster and promote the growth of telegraph and telephone systems. They are recognized as an important element in the business and social life of the day. *Abbott* v. *Duluth*, 104 Fed. Rep. 833; *S. C.*, 117 Fed. Rep. 137; *Duluth* v. *Telephone Co.*, 87 N. W. Rep. 1127; *N. W. Tel. Exch. Co.* v. *Minneapolis*, 86 N. W. Rep. 69; *Wichita* v. *Old Colony Trust Co.*, 132 Fed. Rep. 641; *Wichita* v. *Missouri Telephone Co.*, 78 Pac. Rep. 886; *Rocky Mountain Bell Tel. Co.* v. *Red Lodge*, 76 Pac. Rep. 758; *Chamberlin* v. *Iowa Tel. Co.*, 93 N. W. Rep. 596; *State* v. *Nebraska Telephone Co.*, 103 N. W. Rep. 120; *Wisconsin Telephone Co.* v. *Sheboygan*, 86 N. W. Rep. 657; *S. C.*, 90 N. W. Rep. 441; *Michigan Telephone Co.* v. *Benton Harbor*, 80 N. W. Rep. 386; *Farmer* v. *Columniana Telephone Co.*, 74 N. E. Rep. 1078; *Carthage* v. *Central N. Y. Tel. Co.*, 78 N. E. Rep. 165; *Garnett* v. *Independent Telephone Co.*, 106 N. Y. S. 3; *Texarkana* v. *Southwestern Tel. Co.*, 106 S. W. Rep. 915; *Missouri River Telephone Co.* v. *Mitchell*, 116 N. W. Rep. 67; *Hodges* v. *West. Un. Tel. Co.*, 18 So. Rep. 84.

Section 536 is a general law of the State and is effective in Pomona. *The Pasedena Case*, 118 Pac. Rep. 796, 803; *Ex parte Braum*, 141 California, 204, 214.

The conclusion of the Supreme Court, in the *Pasadena*

Case, that § 536 confers no rights upon telegraph or telephone companies, so far as the streets of Pasadena are concerned, is inapplicable to Pomona, which is a city of the fifth class. Municipal Corp. Act, Cal. Stats., 1883, p. 93; *Fragley* v. *Phelan*, 126 California, 383, 387; *Ex parte Helm*, 143 California, 553; *Dawson* v. *Superior Court*, 13 Cal. App. 582.

Section 536 was not repealed by the Franchise Act of 1905, Stats. Cal., 1905, p. 777.

The provisions of the Franchise Act of 1905 are not inconsistent with those of § 536, as reënacted in 1905, because § 536 is a grant of franchise, and the Franchise Act of 1905 only provides the method by which franchises must be granted; it contains no delegation of power to grant franchises. *Supervisors* v. *Lackawanna &c.*, 93 U. S. 619, 624.

The power to grant franchises, for the use of the highways in a city, inheres in the State. *In re Johnston*, 137 California, 115, 122; *Thomason* v. *Ruggles*, 69 California, 564; *South Pasadena* v. *L. A. T. Ry. Co.*, 109 California, 315.

The delegation to a municipal corporation of the power to grant franchises must clearly appear, before the right to exercise the power may be asserted. Any reasonable doubt, concerning the existence of the power, is to be resolved against the municipal corporation. See *Von Schmidt* v. *Widber*, 105 California, 151; *Glass* v. *Ashbury*, 49 California, 571; *Wisconsin Tel. Co.* v. *Sheboygan*, 86 N. W. Rep. 657, 661; *Water Co.* v. *Los Angeles*, 88 Fed. Rep. 720.

The general rule that, where a later statute deals with the same subject-matter as does an earlier one, and in such way as to indicate that the lawmakers intended the later act to be a substitute for the earlier one, the prior statute is held to have been repealed, does not apply to this case as the 1905 Franchise Act does not deal

with the same subject-matter as does § 536. *Hess* v. *Reynolds*, 113 U. S. 73, 79; *Bank* v. *Cahn*, 79 California, 463, 465; *Patterson* v. *Tatum*, 18 Fed. Cas. 1331.

Any repeal of § 536 of the Civil Code by the Franchise Act of 1905 could have been only by implication. Such repeals are not favored and are never allowed except in cases of clear and irreconcilable conflict. *Supervisors* v. *Lackawanna R. R. Co.*, 93 U. S. 619, 624. See also *Wodd* v. *United States*, 16 Pet. 341, 362; *The Distilled Spirits*, 11 Wall. 356, 365; *Henderson's Tobacco*, 11 Wall. 652; *Arthur* v. *Homer*, 96 U. S. 137, 140; *Chew Heong* v. *United States*, 112 U. S. 536, 549; *Frost* v. *Wenie*, 157 U. S. 46, 58; *United States* v. *Greathouse*, 166 U. S. 601, 605; *Cope* v. *Cope*, 137 U. S. 682, 686; *Wetzell* v. *Paducah*, 117 Fed. Rep. 647; *Merrill* v. *Gorham*, 6 California, 41; *Soher* v. *Supervisors*, 39 California, 134; *Malone* v. *Bosch*, 104 California, 680, 683; *Banks* v. *Yolo Co.*, 104 California, 238; *Thompson* v. *Supervisors*, 111 California, 553, 556; *Hilton* v. *Curry*, 124 California, 84; *Rowe* v. *Hibernia Sav. & L. Soc.*, 134 California, 403, 406.

Section 536 of the Civil Code was reënacted at the same session of the legislature and at about the same time that the Franchise Act of 1905 was passed. This circumstance is a strong argument against the repeal by implication of the former by the latter. *State* v. *Board of Commissioners*, 85 N. E. Rep. 513, 522; *State* v. *Duncan* (Ala.), 50 So. Rep. 265, 266; *Stubblefield* v. *Menzies*, 11 Fed. Rep. 268, 276.

The Circuit Court erred in concluding that § 536 of the Civil Code was repealed by the Franchise Act of 1905. Judge Gilbert, in his dissenting opinion in the Circuit Court of Appeals, did not follow that conclusion. *N. W. Tel. Exch. Co.* v. *St. Charles*, 154 Fed. Rep. 386, does not support the conclusion for which it is cited.

Appellants concede that, under § 536 telephone lines doing an interstate business are entitled to use the high-

ways of the State, including the streets of Pomona. The lines of the appellee in Pomona are part of a homogeneous interstate telephone system operated by the appellee and extending throughout the State of California and in the States of Nevada, Washington and Oregon.

The system in Pomona is a part of the interstate telephone system of the appellee extending throughout the State of California and into many parts of the States of Nevada, Oregon and Washington. *United States* v. *Southern Ry. Co.*, 164 Fed. Rep. 347, 349; *United States* v. *Pittsburg &c. Ry. Co.*, 143 Fed. Rep. 360; *United States* v. *Northern Pac. Terminal Co.*, 144 Fed. Rep. 861; *United States* v. *Great Northern Ry. Co.*, 145 Fed. Rep. 438.

Without excluding interstate telephone lines from its operation, the act of March 22, 1905, would be unconstitutional under the commerce clause. Interstate telephone communications are interstate commerce. *Muskogee Telephone Co.* v. *Hall*, 118 Fed. Rep. 382; *West. Un. Tel. Co.* v. *Pendleton*, 122 U. S. 347; *In re Penn. Telephone Co.*, 20 Atl. Rep. 846. See also *Pasadena* v. *L. A. T. Ry. Co.*, 109 California, 315; *People* v. *Craycroft*, 11 California, 544.

The appellee has the right under § 19 of Art. XL of the constitution of the State of California, as amended October 10, 1911, to use the streets of the City of Pomona for its telephone system without a special franchise therefor from the city.

This section has been construed by the Supreme Court of California to be a direct grant, from the State, to the persons therein designated, and a city may not require the persons, to whom the grant is made, to obtain a permit from it, as a condition precedent to the exercise of the right granted by the constitutional provision. See *People* v. *Stephens*, 62 California, 209, 235; *In re Johnston*, 137 California, 115, 119; *Denninger* v. *Recorder's Court &c.*,

145 California, 638; *Stockton Gas Co.* v. *San Joaquin Co.*, 148 California, 313, 318; *San Francisco* v. *Oakland Water Co.*, 148 California, 331, 333; *People* v. *Los Angeles Gas Co.*, 150 California, 557; *Pugh* v. *McCormick*, 14 Wall. 361.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought by the appellee, a California corporation, to restrain the City of Pomona from removing the appellee's poles and wires from the streets of the city, and from preventing the appellee's placing further poles and wires in the streets. The Circuit Court dismissed the bill, 164 Fed. Rep. 561, but the decree was reversed and an injunction granted by the Circuit Court of Appeals. 172 Fed. Rep. 829. 97 C. C. A. 251. Two of the grounds originally relied upon were that the appellee, being a telegraph as well as a telephone company, had rights under the act of Congress of July 24, 1866, c. 230, 14 Stat. 221 (Rev. Stat., §§ 5263 *et seq.*), that were infringed, and that the conduct of the city had given rise to a contract. These are no longer pressed, but they warranted taking the case to the Circuit Court of Appeals. *Spreckles Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407. The remaining ground is that the constitution of California as amended in 1911, or the statutes of the State, contained a grant with which the Constitution of the United States does not permit the city to interfere. This is the only argument pressed here. Unless the appellee got a grant from one of these two sources it has no right to occupy the streets.

The claim based upon the amendment to Article XI, § 19, of the constitution of the State, October 10, 1911, does not impress us. Before that date the article provided that in cities having no public works for artificial light, etc., individuals or corporations of the State duly authorized should have the privilege of using the streets, etc., for the purpose, upon the condition that

the municipal government should have the right to regulate the charges. By the amendment "any municipal corporation may establish and operate public works for . . . telephone service" either by construction or by purchase. It then goes on, "Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof." We agree with the appellants that the amendment seems intended as a step in the direction of municipal ownership or control. The words 'upon such conditions,' etc., are not to be confined to police powers, which are conferred by § 11 of the same article, but are of general import. If the municipal corporation does not see fit to establish the public works itself it may let others do it, but its power to impose conditions excludes the notion that the constitution alone is a grant to others of a right to occupy the streets without its consent.

The claim founded upon the statutes seems to us stronger. By § 536 of the Civil Code "Telegraph corporations may construct lines of telegraph along and upon any public road or highway . . . and may erect poles . . . in such manner and at such points as not to incommode the public use of the road." This is treated by the Supreme Court of California as a grant when acted upon. *Western Union Telegraph Co.* v. *Hopkins*, 116 Pac. Rep. 557. But as the words 'telegraph corporations' have been construed not to include telephone corporations; *Sunset Telephone & Telegraph Co.* v. *City of Pasadena*, 118 Pac. Rep. 796; a construction that we know no sufficient reason for not following; *Yazoo & Mississippi Valley R. R. Co.* v. *Adams*, 181 U. S. 580; *Richmond* v. *Southern Bell Telephone & Telegraph Co.*,

174 U. S. 761; the section until amended did the appellee no good. On March 20, 1905, however, the section was amended so as to include telephone corporations, so that, if that were all, the case of the appellee would be clear, the City of Pomona not having been organized under provisions of the constitution that withdrew certain cities from the operation of general laws. See *Ex parte Helm*, 143 California, 553; *Sunset Telephone & Telegraph Co.* v. *Pasadena*, 118 Pac. Rep. 796, 803.

But the amendment did not go into effect for sixty days, and two days later, on March 22, a franchise act was passed, to take effect immediately, providing that "every franchise or privilege to erect or lay telegraph or telephone wires, to construct or operate street or interurban railroads . . . or to exercise any other privilege whatever hereafter proposed to be granted" by the legislative body of any county, city and county, city or town, except telegraph or telephone lines doing an interstate business, should be granted upon the conditions specified in the act and not otherwise. "Any applicant for any franchise or privilege above mentioned" was required to file an application, there was to be an advertisement for bids, etc., with other particulars that need not be specified, as the appellee does not claim under this statute. It contends that this act establishes conditions only for counties, cities and towns, and does not qualify the grant from the State in the amended § 536. The appellant, on the other hand, argues that the franchise act repealed § 536, so far as it affects this case, except as to telephones doing an interstate business. In view of the frame of the act as a whole, of a general repealing clause at the end, naming certain exceptions of which § 536 is not one, and of the fact that the grant of such franchises seems generally to have been left to the local subdivisions concerned, *Sunset Telephone & Telegraph Co.* v. *Pasadena*, 118 Pac. Rep. 796, 803, we construe the words quoted as

of general application, and are of opinion that they cannot be supposed to have had the narrow operation that would be left to them if there were in force a grant from the State of almost universal scope. Until the state court shall decide otherwise we must take § 536 to have been repealed, subject to the exception contained in the later act, before any grant or right under it had accrued to the appellee.

We come then to consider the extent of the exception. This is not a question whether all telephones having the usual connections might not be instruments of commerce among the States; it is not a question whether the State could interfere with the local business of lines engaged in such commerce. It is a question of how far the offer of a grant that had not yet taken effect should be understood to have been left on foot by the repealing act; a question as to the meaning of words. In construing them it may be assumed that the exception was made unwillingly. No policy can be discovered that would be likely to induce the making of it, and it is most easily explained by the uncertainty then prevailing as to the power of the State over telegraphs, etc., running into other States, in view of the commerce clause of the Constitution and the act of July 24, 1866; an uncertainty then lately and since largely dispelled. *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.*, 195 U. S. 540. *Western Union Telegraph Co.* v. *Richmond*, April 1, 1912. The words to be interpreted are 'except telegraph or telephone lines doing an interstate business.' The qualification 'doing an interstate business' shows that not all telephones were expected to benefit by the grant in § 536, and the limitation is presumably substantial. The legislature probably supposed by mistake that it was bound to grant a right to direct through lines but evidently meant to grant no more than it must. It was understood so by the city. The order and threat of the city were confined to poles and wires

doing a state and local business. This appears by the bill and the finding of the Circuit Court, not disturbed above, as to what actually was done. We are of opinion that the city's interpretation was correct.

The result is that the appellee must be taken to have a grant of the right to keep its main through lines in the streets of Pomona, but not to maintain the posts and wires by which it connects with subscribers. So far as appears the city attacks only the latter, and therefore no present ground is shown for the bill. But as the line of distinction may be delicate and questions may arise the bill will be dismissed without prejudice.

Decree reversed.

Bill to be dismissed without prejudice.